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July 1
REPORTS

OF

DECISIONS IN CRIMINAL CASES

MADE

AT TERM, AT CHAMBERS,

AND IN THE

COURTS OF OYER AND TERMINER

OF THE

STATE OF NEW YORK.

BY AMASA J. PARKER, LL. D.

VOL. V.

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OF THE

STATE OF NEW YORK,

SINCE THE ADOPTION OF THE CONSTITUTION OF 1846.

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ELISHA P. HURLBUT,
JOHN W. EDMONDS,
WILLIAM MITCHELL,
JAMES G. KING, JR.,
JAMES J. ROOSEVELT,
ROBERT H. MORRIS,
THOMAS W. CLERKE,
EDWARD P. COWLES,
HENRY E. DAVIES,
JAMES R. WHITING,
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JOSIAH SUTHERLAND,
DANIEL P. INGRAHAM,
WILLIAM H. LEONARD,
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WILLIAM T. McCOUN,
NATHAN B. MORSE,
SEWARD BARCULO,
JOHN W. BROWN,
WILLIAM ROCKWELL,
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IRA HARRIS,
MALBONE WATSON,
AMASA J. PARKER,
GEORGE GOULD,
DEODATUS WRIGHT,
HENRY HOGEBOOM,
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ALONZO C. PAIGE,
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CORNELIUS L. ALLEN,
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DANIEL PRATT,
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LEVINUS MONSON,
SCHUYLER CRIPPEN,
RANSOM BALCOM,
WILLIAM W. CAMPBELL,
JOHN M. PARKER.

JUSTICES OF THE SUPREME COURT.

v

SEVENTH JUDICIAL DISTRICT.

**THOMAS A. JOHNSON,
JOHN MAYNARD,
HENRY WELLES,
SAMUEL L. SELDEN,
HENRY W. TAYLOR,
THERON R. STRONG,
E. DARWIN SMITH,
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EIGHTH JUDICIAL DISTRICT.

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JAMES MULLETT,
SETH E. SILL,
RICHARD P. MARVIN,
MOSES TAGGART,
LEVI F. BOWEN,
BENJAMIN F. GREEN,
MARTIN GROVER,
NOAH DAVIS, JR.,
CHARLES DANIELS.**

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DECISIONS
IN
CRIMINAL CASES
IN THE
STATE OF NEW YORK.

SUPREME COURT. Broome General Term, May, 1860. *Mason, Balcom, Campbell and Parker*, Justices.

ALFRED BIRGE, plaintiff in error, *v.* THE PEOPLE, defendants in error.

The judges of a Court of Oyer and Terminer have no power to settle and sign a bill of exceptions after a final adjournment of such court.

Where, after the adjournment of a Court of Oyer and Terminer, a bill of exceptions in a criminal case which had been tried at such court, was settled by the justice of the Supreme Court, who had presided on the trial, and was afterward signed by such justice, and also by the two justices of the Sessions, who sat with him on the trial, and was filed more than ten days after such adjournment, and was afterward returned as part of the record on a writ of error, this court, on motion by the District Attorney, ordered the bill of exceptions to be struck from the record.

MOTION by the District Attorney of Otsego county, to dismiss writ of error, and strike the bill of exceptions from the return or record in this cause. The prisoner was convicted of forgery in the second degree, and sentenced to the state prison at Auburn, for the term of six years, at a Court of Oyer and Terminer, held in Otsego county, on the first day of July, 1859. Exceptions were taken on the trial

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by the prisoner's counsel, but were not settled or signed during the sitting of the court. After the court was adjourned *sine die*, the prisoner's counsel made a bill of exceptions, and served a copy on the District Attorney, who proposed amendments thereto, but under a protest that the right to make a bill of exceptions, or have the same settled, was gone when the court adjourned. The exceptions were afterward settled by the justice of the Supreme Court, who presided on the trial; and the bill was signed by him, and the two justices of the Sessions, who formed part of the court on the trial; but the county judge, who was a member of the Oyer and Terminer, and on the bench during the trial, refused to sign the bill. The District Attorney objected to the bill being settled or signed out of court, and the same was settled and signed under his protest. The bill was filed, and a writ of error was issued out of this court to the Oyer and Terminer; and the writ and a copy of the record, including the bill of exceptions, was returned to this court, and then the above mentioned motion was made.

A. Becker, for plaintiff in error.

E. Countryman (District Attorney), for defendants in error.

BALCOM, J. I did not understand when I settled the bill of exceptions in this case, that any objection was made on the ground that I should go to Cooperstown and have the other members of the Oyer and Terminer present on the settlement of the bill. I supposed the only ground of objection was, that the prisoner's counsel had no right to make a bill of exceptions, and have the same settled, *after* the adjournment of the Oyer and Terminer without day; and I shall examine the questions now raised, on the supposition that this was the only objection taken to the settlement or signing of the bill.

If there was no statute or rule authorizing the settlement of cases and exceptions in civil actions, subsequent to the adjournment of the Circuit Court, the same could not be settled after the final adjournment of that court, unless otherwise ordered. The law is the same in regard to criminal actions;

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and there is no statute or rule that authorizes the settlement of bills of exceptions in such actions after the final adjournment of the courts wherein they are tried. The practice always has been, so far as my knowledge extends, to have bills of exceptions settled and signed in criminal cases before the final adjournment of the courts in which they are tried.

The statute authorizing exceptions in criminal cases is as follows: "On the trial of any indictment, exceptions to any decision of the court may be made by the defendant, in the same cases and manner provided by law in civil cases; and a bill thereof shall be settled, signed and sealed, and shall be filed with the clerk of the court, and returned upon a writ of error, as now authorized in personal actions, or upon a *certiorari*, as hereinafter provided, and the same proceedings may be had to compel the signing and sealing of such bill and the return thereof" (2 R. S., 736, § 21.)

This statute does not require the prisoner's counsel to serve a copy of his proposed bill of exceptions on the District Attorney, or authorize the latter to serve amendments thereto. It seems to contemplate that the bill shall be settled and signed in the presence of the prisoner, or his counsel, and the District Attorney, at the conclusion of the trial, or at least before the final adjournment of the court. What is said in section 23 (2 R. S., 736), in regard to staying judgment on the indictment, supports this conclusion; for there can be no stay of judgment until the bill of exceptions is settled and filed with the clerk. And when judgment is stayed, it is "the duty of the District Attorney of the county *immediately* to sue out a writ of *certiorari*, returnable in the Supreme Court." (2 R. S., 736, § 27.) Provision is also made when the prisoner sues out a writ of error for having the case heard as soon as practicable. (2 R. S., 740 and 741.) All the statutes applicable to the review of criminal cases denote speed; delays are guarded against, and speedy justice seems to have been contemplated by the legislature.

If bills of exceptions in criminal cases can be made and settled after the final adjournments of the courts wherein they

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are tried, then the different members of such courts must convene at the court house where the trials have been had, or at some other place, for the settlement of each bill; for it seems the presiding judge cannot settle such bills alone; the other members of such courts have a voice in the business. (See *Clarke v. Dutcher*, 19 *Johns. R.*, 246.) If the members of such courts must reassemble for such purposes, who shall fix the time and place for them to meet or notify each one to attend? The legislature has made no provision on the subject, and there is no practice applicable to the question.

For the foregoing reasons, I am of the opinion the judges of a Court of Oyer and Terminer are not authorized to settle a bill of exceptions after the final adjournment of such court. This conclusion is in harmony with the decision of this court, made at a general term in the first district, in *The People v. Appo* (18 *How. Pr. R.*, 350), where it was held that all the powers of a Court of Oyer and Terminer terminate when it adjourns *sine die*.

It follows that the bill of exceptions in this case could not be settled and signed after the final adjournment of the court wherein the exceptions were taken, and that the bill is improperly in the return to the writ of error, and must be struck out. The writ of error, however, cannot be dismissed; for it is a writ of right (2 *R. S.*, 740, § 15.) The prisoner has the right to have it retained, although there will be no bill of exceptions in the record.

I will remark, further, that I do not regret, coming to the conclusion in this case, that the bill of exceptions must be expunged from the record, for the reason that no intimation was made, prior to the final adjournment of the Oyer and Terminer, at which the prisoner was convicted, of any desire or intention to make a bill of exceptions, and I am well satisfied the prisoner was guilty of the crime of which he was convicted.

MASON, J. This writ of error must be quashed, and the bill of exceptions set aside, for the reason that the writ of error

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was improvidently allowed, and the bill illegally settled. The bill of exceptions must be settled by the Court of Oyer and Terminer as a court. It cannot be settled by the circuit judge who presides in the Oyer and Terminer. And if we assume that the bill can be settled by the Court of Oyer and Terminer, convened in vacation (which I very much doubt), it does not help the case, for the bill was settled by the presiding judge alone in the absence of his associates, and was then presented to the other justices, and signed by them. This was clearly unauthorized. The principle settled in *Clarke v. Dutcher* (19 Johns. R., 236), is decisive of this question. In this case, the bill of exceptions was presented to the judges of the Court of Common Pleas, individually, out of court, and was signed and sealed by them separately, and this court held the bill of exceptions irregular, and that it should be settled by all the judges, sitting together as a court. The court say, "separately and individually, they cannot act judicially as a court. This it seems to me is too plain a proposition to require the citation of authorities to establish." The doctrine of the common law is, that when a power, authority or duty involving the exercise of judgment and discretion, is confided by law, to three or more persons, or whenever three or more officers are authorized, or required by law to perform any act, such act may be done, and such power, authority or duty may be exercised and performed by a majority of such persons or officers, upon a meeting, and consultation of all. All must meet and confer, or the act is invalid (4 Denio R., 125; 21 Wend. R., 211; 23 Id., 324; Cow. R., 328; 7 Id., 526; 3 Denio R., 252, 253), and this is statute law with us in this State. (2 R. S., 555, § 27; see, also, *Keeler v. Frost & Worden*, 22 Barb. R., 400.) The common law practice required the bill of exceptions to be presented during the term at which the trial took place. (9 Johns. R., 346.) There is nothing in the statute which would interfere with the elementary common law doctrine, that the court as a court must settle the bill of exceptions. It remains to consider the question whether, under the statute, the judges of the Oyer and Terminer can

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convene as a court in vacation, and settle the bill. The statute is as follows: "On the trial of any indictment, exceptions to any decision of the court, may be made by the defendant in the same cases and manner provided by law in civil cases; and a bill thereof shall be settled, signed and sealed, and shall be filed with the clerk of the court, and returned upon a writ of error, as now authorized in personal actions, or upon certiorari, as hereinafter provided, and the same proceedings may be had to compel the signing and sealing such bill, and the return thereof. (2 R. S., 736, § 21.) There is nothing in this statute determining the manner in which the bill of exceptions shall be settled by the court. The first paragraph declares that exceptions may be made by the defendant in the same cases and manner provided by law in civil cases. This refers solely to the cases in which the defendant may take exceptions, and the manner in which it shall be done upon the trial, and has no reference to the settlement and sealing the bill. The next paragraph declares that the bill shall be settled, signed and sealed, and filed with the clerk, and the section is silent as to how and when it shall be settled, and the next paragraph declares that the bill shall be returned upon a writ of error, as now authorized in personal actions, or upon a certiorari, as hereinafter provided. This certainly has no reference to the mode and manner of settling the bill of exceptions. I am of opinion, for the reasons stated, that the bill of exceptions upon criminal trials are not to be settled as in civil actions. That the statutes in regard to bills of exceptions in civil actions have no application to the manner of drafting the bill of exceptions, or of the settlement thereof.

But suppose we are wrong in this construction of the statute, and that the statute in regard to exceptions in civil actions is to control; I do not see how it can help the case in the least. The statute provides that in all cases where exceptions are allowed by law on the trial of any cause, either party may make such exception at the time the decision complained of is made, or if such exception be made to the charge given to the jury, it shall be made before the jury shall have delivered

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their verdict (2 *R. S.*, 423, § 74); and the next section provides that such exception shall be in writing, but that the court may allow such time as shall be deemed reasonable to settle and reduce the same to form. (§ 75.) The court made no order, in the case before us, giving any such time, and there is no time in such a case, unless the rules of the Supreme Court in civil actions are to be deemed to apply. The rule of the court was, at the time of the passage of this statute, that a case or bill of exceptions must be made and served within four days, while the present rule gives ten days. The question arises, then, whether the four day or the ten day rule shall control. If the change of the rules of the court in civil actions controls the criminal practice, then defendant had ten days, and served his bill in time. But it may well be doubted whether such is the rule. If the new rule is to control, I do not see how it can relieve the defendant from the effect of the present rule 37, which declares that when a party makes exceptions, he shall procure the same to be filed within ten days after the same shall be settled, or he shall be deemed to have abandoned the exceptions. This bill of exceptions was not filed until several months after the bill was settled, and the defendant must therefore be deemed to have abandoned his exceptions.

My own opinion of the case is, that the exceptions must be settled by the court that tries the indictment, and before it adjourns, for the reason that the Court of Oyer and Terminer is not a continuing court, and that all its powers as a court terminate with the adjournment. This was expressly held, in the general term in the first district, in the case of *The People v. Appo* (18 *How. Pr. R.*, 350); and the practice of this court is, where a bill of exceptions is settled and signed in this irregular way, to set aside the bill as improvidently signed. (*Shepherd v. White*, 3 *Cow. R.*, 32.) I advise that the bill of exceptions in this case be set aside and the writ of error quashed, for the reasons stated.

Ordered that the bill of exceptions be struck from the record.

SUPREME COURT. Monroe General Term, September, 1860.
Smith, Johnson and Knox, Justices.

JAMES L. MUNSON and al., plaintiffs in error, v. THE PEOPLE,
defendants in error.

Form of an indictment for nuisance, in erecting and maintaining a dam, by which lands were overflowed to the injury of the public health.

Where a defendant is found guilty on an indictment for a nuisance, in erecting and maintaining a dam, and there is no averment in the indictment of a continuance of the nuisance, the court is not authorized to render a judgment for the abatement of the nuisance. It can only inflict a personal punishment upon the defendant. And where a judgment of abatement had been improperly rendered by the Court of Oyer and Terminer, in such a case, the Supreme Court, on writ of error, reversed the judgment and remitted the proceedings to the Oyer and Terminer, that a proper sentence might be passed.

THIS case came up on writ of error to the Court of Oyer and Terminer of Ontario county. By the return to the writ, it appeared an indictment had been found against the plaintiffs in error in the following words:

State of New York, Ontario County, ss:

The jurors for the People of the State of New York and for the body of the county, to wit: Henry Smith, &c., &c., being sworn and charged to inquire for the People of the said State, and for the body of the county aforesaid, upon their oath, present, that James L. Munson and Jacob Ansberger, late of the town of Hopewell in the county aforesaid, on the first day of June, in the year of our Lord one thousand eight hundred and fifty-seven, with force and arms, at the town of Hopewell in the county aforesaid, being possessed of a certain mill and mill-dam, which said mill and mill-dam were built, erected and maintained by the said James L. Munson and Jacob Ansberger, across a certain outlet and common water-course called "Canandaigua Outlet," near a certain place called "Canandaigua," in said county, which continually and during said time, and at all times of the year, hath run and

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been used and accustomed, and of right ought, without any obstruction or impediment, to run out of a certain lake called "Canandaigua Lake," situate and being in said county within its natural banks, through the lands and premises of divers good and lawful citizens of the State of New York.

And the jurors aforesaid, upon their oath aforesaid, do further present that the said James L. Munson and Jacob Ansberger, being so possessed of a certain mill and mill-dam with their appurtenances, situate near and adjacent to a certain common highway and public road, and the dwelling houses of divers of the good citizens of the State of New York, at the town and in the county aforesaid, on the first day of June in the year of our Lord one thousand eight hundred and fifty-seven, and on divers days before and since that day, by so building, erecting and maintaining the said mill, and the said mill-dam being so as aforesaid built, erected and maintained across the said outlet and common watercourse, as aforesaid, did injuriously, unlawfully and maliciously obstruct the water in its said ancient course, so that it did not run as it was used and accustomed to do, but by means thereof and thereby, injuriously, unlawfully and maliciously, did permit and cause the said water of the said mill-dam to overflow the natural banks of the said ancient and common watercourse, upon either side and on both sides of the said watercourse, and to flow back upon to a great distance, to wit: for the distance of five miles on either side and on both sides of the said watercourse, and overflow and cover and submerge the lands of the good and lawful citizens of the State of New York, there lying and situate adjacent thereto, on either side and on both sides of the said watercourse, so that by reason thereof the same could not be cultivated, by means whereof the mud, wood, leaves, brush, and animal and vegetable substances, and other filth, collected and brought down the channel of the said watercourse, and from the waters of the said lake, by the natural flowing of the waters, then became and were, during all the time aforesaid, collected and accumulated in large quantities in the channel of the said watercourse, by the

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natural flowing of the waters, and on the lands and premises overflowed, covered and submerged, as aforesaid; and the said mud, wood, leaves, brush, and animal and vegetable substances, and other filth so there collected and brought down the channel of the said watercourse, and by the waters of the said lake, became and were, and still are very offensive, and the waters became and are corrupted, and by means whereof and from the action of the same upon the said mud, wood, leaves, brush, and the animal and vegetable substances, and other filth brought down the channel of the said watercourse, and upon the vegetable substances then growing upon the margin of the said watercourse, and upon the said lands overflowed and submerged as aforesaid, and by the alternate rise and fall of the water in the said pond and upon the said adjacent lands, the said mud, wood, leaves, brush, and the animal and vegetable substances and water, so as aforesaid collected, became stagnant, putrid and noxious, from whence unwholesome damps, fogs and smells did arise, whereby the air was greatly corrupted and infected, to the great damage and common nuisance of all the good and lawful citizens of the State of New York dwelling thereabouts, and all others passing and repassing on the said highway and near the said highway and near the said stagnant waters, and against the form of the statute in such cases made and provided, and against the peace of the People of the State of New York and their dignity.

And the jurors aforesaid, upon their oath aforesaid, do further present, that the said James L. Munson and Jacob Ansberger, at the town aforesaid, and in the county aforesaid, on the first day of June, in the year of our Lord one thousand eight hundred and fifty-seven, being possessed of a certain mill and mill-dam, which said mill and mill-dam were built, erected and maintained across a certain ancient and common watercourse called "Canandaigua Outlet," near a certain place called "Canandaigua," in said county, which continually and during the said time, and at all times of the year, hath run and been used to and accustomed and of right ought, without

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any obstruction or impediment, to run out of a certain lake called Canandaigua lake, situate and being in said county aforesaid, within its natural banks, through the lands and premises of divers good and lawful citizens of the State of New York.

And the jurors aforesaid, upon their oath aforesaid, do further present, that the said James L. Munson and Jacob Ansberger, being so possessed of a certain mill and mill-dam, with their appurtenances, situated near and adjacent to a certain common highway and public road, and the dwelling houses of divers of the good citizens of the State of New York, at the town and in the county aforesaid, on the first day of June, in the year of our Lord one thousand eight hundred and fifty-seven, and on divers other days, before and since that day, unlawfully, willfully and maliciously, did raise, elevate and increase the height of the said dam, so as aforesaid built, erected and maintained across the said ancient watercourse, by placing, erecting, fixing and building upon the top thereof, certain timbers, boards, gravel, earth and stones, by reason of which and whereby the said dam was unlawfully, willfully and maliciously raised, elevated and erected above the ancient level of the said dam, to a great height, and extended on the top of the said dam to a great distance, to wit: across the said ancient watercourse.

And the jurors aforesaid, upon their oath aforesaid, do further present, that the said James L. Munson and Jacob Ansberger, from the said first day of June, in the year one thousand eight hundred and fifty-seven, and before and since that time until the taking of this inquisition, unlawfully, willfully, knowingly and injuriously, did continue, and respectively doth now unlawfully, willfully, knowingly and injuriously continue the said unlawful and injurious elevation and height of the said dam across the ancient and common watercourse as aforesaid, by means whereof and whereby, the water flowing in the said Canandaigua outlet from the rains and from the Canandaigua lake, was unlawfully, willfully, knowingly and injuriously stopped, dammed up and obstructed in its said ancient course,

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so that it did not run as it used and was accustomed to do, but by means thereof and thereby, the said James L. Munson and Jacob Ansberger, did permit and cause the water of the said mill-dam to overflow the natural banks of the said ancient and common watercourse, upon either side and on both sides of the said watercourse, and to flow back to a great distance, to wit: for the distance of five miles on either side and on both sides of the said watercourse, upon and overflow, cover and submerge the lands of the good and lawful citizens of the State of New York, there lying and situate adjacent thereto, on either side and on both sides of the said watercourse, so that by reason thereof the same could not be cultivated, and by means whereof the mud, wood, leaves, brush, and animal and vegetable substances, and other filth, collected and brought down the channel of the said watercourse, and from the waters of the said lake, by the natural flowing of the waters, they became and were, during all the time aforesaid, collected and concentrated in large quantities in the channel of the said watercourse, by the natural flowing of the waters, and upon the lands and premises overflowed, covered and submerged, as aforesaid; and the said mud, wood, leaves, brush, and animal and vegetable substances, and other filth so there collected and brought down the channel of the said watercourse, and by the waters of the said lake, became and were, and still are, very offensive, and the waters became and are corrupted; and by means whereof and from the action of the sun upon the said mud, wood, leaves, brush, and the animal and vegetable substances, and other filth collected and brought down the channel of the said watercourse, and the vegetable substances then growing upon the margin of the said watercourse, and upon the said land so overflowed and submerged, and by the alternate rise and fall of the water in the said pond and upon the said adjacent lands, the said mud, wood, leaves, brush, and the animal and vegetable substances and water, so as aforesaid collected, became stagnant, putrid and noxious, from whence unwholesome damps, fogs and smells did arise, whereby the air was greatly infected, to the great damage and common

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nuisance of all the good and lawful citizens of the State of New York dwelling thereabout, and all others passing and repassing on the said highway and near the said stagnant waters, and against the form of the statute in such cases made and provided, and against the peace of the People of the State of New York and their dignity.

EDWIN HICKS, *District Attorney.*

The defendants pleaded not guilty, and the issue came on to be tried before Hon. E. Darwin Smith, justice of the Supreme Court, and two associate justices, on the 15th November, 1859. After the testimony was closed, the presiding judge explained to the jury that the first count was for erecting, maintaining and continuing a dam which obstructed the flow of the water in the outlet, and thereby created alleged nuisance.

That the second count assumed the existence of a dam, and was for raising the height of the dam, and thereby creating the difficulty complained of.

The judge further instructed the jury that the evidence did not warrant them in convicting the defendants under the second count in the indictment, and that their deliberations were to be confined to the evidence applicable to the first count of the indictment.

The jury, after being charged fully by the court upon the questions involved in the case, retired for consultation, and afterward rendered a verdict by which they found the defendants guilty.

Upon this verdict, judgment was then entered in the following words:

"Judgment ordered, that the defendants abate the nuisance at their own cost, within sixty days; and that, in default thereof, process issue to the sheriff of the county, commanding him to abate the nuisance at the cost of the defendants."

H. O. Chesbro, for the plaintiffs in error, claimed that the judgment rendered by the Court of Oyer and Terminer upon the conviction, was unauthorized by the conviction and erro-

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neous ; that there being no averment in the first count that the defendants continued to maintain the dam at the time of the indictment, no judgment of abatement could be rendered ; citing 1 *Chitty's Cr. Law*, 716, *marg.* ; 2 *Id.*, 607, *note u*, 610 to 618 ; 3 *Arch. Cr. Pl.*, 609, 651, 6th ed. ; 12 *Petersdorff Abr.*, 795, *marg.* ; *Wharton's Cr. Law*, § 2368 ; 1 *Russell on Crimes*, 331, *marg.* ; 4 *Black. Com.*, 168, *note 12* ; *King v. Stead*, 8 *Term R.*, 142 ; *The King v. Pappineaux*, 2 *Strange*, 686 ; 7 *Term R.*, 467 ; 10 *Foster R.*, 279 ; 21 *Maine R.*, 84 ; 16 *Ala. R.*, 144 ; 16 *Conn. R.*, 54.

Wm. H. Smith (District Attorney), for defendants in error.

By the Court, KNOX, J. At the Oyer and Terminer, the jury were instructed by the presiding justice, that the evidence did not warrant a conviction upon the second count in the indictment, which was for a nuisance. A person may be indicted for causing, erecting, and *maintaining* a nuisance ; and he may also be indicted for *continuing* a nuisance, created and maintained by another, or which was created by himself. They are distinct offenses. It evidently would not be a bar to an indictment for *continuing* a nuisance, that the party had been convicted of erecting and maintaining the same nuisance. (*The King v. Stead*, 8 *Durn. & East*, 142.) In *Staple v. Spring and al.* (10 *Mass. R.*, 75), SEWALL, J., says : " An action of the case lies against him who erects a nuisance, and against him who continues a nuisance erected by another. The occupant as well as the owner of the place, suppose a house or mill, erected to the nuisance of another, is liable in the action of the case, which may be brought by the successive owners and occupants of the place where the injury is sustained. In short, the continuance, and every use of that which is, in its erection and use, a nuisance, is a new nuisance, for which the party injured has a remedy for his damages. And although after judgment and damages recovered in an action for erecting a nuisance, another action is not to be maintained for the *erection*, yet another action will lie for the continuance of the same nuisance."

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The same has been held in this State. (2 *Kern. R.*, 492; 29 *Barb. R.*, 294; see also *Bouvier Inst.*, 2d vol., 577.) These cases are cited, and many more might be, to show that, both in criminal and civil actions, the distinction above mentioned is well recognized. Indeed, no authorities are requisite, for it exists in the nature of things.

The count, in the indictment upon which the defendants were convicted, being the first, was for having erected and maintained a nuisance. There is no averment that it *continued* down to the time of the indictment. For aught that appears in the count, the nuisance had ceased to exist when the indictment was found, and that the only object of the people was to punish the defendants for what they had done, and not for what they continued to do.

The averments in regard to the erection of the nuisance are all in the past tense.

The judgment upon the verdict was, "That the defendants abate the nuisance, at their own cost, within sixty days, and that, in default thereof, process issue to the sheriff of the county, commanding him to abate the nuisance at the cost of the defendants."

The defendants allege that this judgment was unauthorized by the conviction, and erroneous. I am of that opinion. Suppose the fact to be, as it may be, that when the indictment was found, the dam had been pulled down, and the nuisance abated? Obviously, the sheriff, with the precept to abate what did not exist, would be sent on a "fool's errand," and the defendants would go wholly unpunished. It might be true in a case where a person was indicted for continuing a nuisance, that before the trial and conviction, the nuisance had been abated, so that a mere judgment to abate would not punish the defendant. There would be, however, congruity upon the record; besides, in such a case, upon proof that the nuisance had been abated, the court might order the defendants to be fined or imprisoned. Here, then, is manifest incongruity.

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The object of the prosecution is to remove the nuisance, and to that end alone the sentence is in general directed.

It is, therefore, usual, when the nuisance in the proceedings is stated as continuing, in addition to a fine, to order the defendant, at his own costs, to abate the nuisance." (2 *Strange*, 686; *Black. Com.*, vol. 2, Book 4, p. 167; *Sharswood's ed. in note.*)

The case before cited from Term Reports was this: William and John Stead were indicted for erecting a wall across a highway, and found guilty at the Quarter Sessions, which directed a precept to the sheriff to abate the nuisance, and afterward the same court adjudged that the defendants be fined six pence each for said nuisance and be discharged. A writ of error was brought, and it was assigned for error that the court below had not ordered that the nuisance be abated. *France* urged that such a judgment was proper, though the indictment did not charge the nuisance as *continuing*. *Lambe, contra*, was stopped by the court.

Lord KENYON, Ch. J.: "When this case came before us on the former occasion, we intimated a strong opinion that the judgment given below was not erroneous, and I am now clearly of the same opinion. When a defendant is indicted for an existing nuisance, it is usual to state the nuisance and its continuance down to the time of taking the inquisition; it was so stated in *R. v. Pappineau, et adhuc existit*; and, in such cases, the judgment should be that the nuisance be abated. But, in this case, it does not appear in the indictment that the nuisance was then in existence; and it would be absurd to give judgment to abate a supposed nuisance which does not exist. If, however, the nuisance still continue, the defendant may be again indicted for continuing it.

But if it be, it seems extraordinary that the prosecutor did not adopt the usual form of indictment. There is something of novelty indeed in another part of these proceedings, for it appears, that before judgment was given at the sessions, a precept was issued to the sheriff in the nature of an execution; then afterward a proper judgment was given, adapted

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to the circumstances of the case. The defendants having erected a nuisance, were fined by the court, but as there was no existing nuisance (for none such then appeared), of course no judgment was given to abate it.

GROSE, J., of the same opinion.

LAWRENCE, J. What was said by Mr. J. REYNOLDS in *R. v. Pappineau* is decisive, "that every judgment should be adapted to the nature of the case; when the erection is the nuisance, there ought to be a demolition; that is, where the nuisance exists at the time of the judgment. But in this case, the charge only is, that the defendant at a time which was past, had erected a wall across the highway, which was a nuisance; but to adjudge that a nuisance which does not exist, should be abated, would not be a judgment adapted to the nature of the case. With respect to proceedings on writs of assize of nuisance, &c., those are cases in which from the nature of the proceedings the nuisance is supposed still to continue."

It is to be regretted that the indictment did not contain a count for *continuing* the nuisance, if such were the fact, because the view here taken may render it necessary, perhaps, to have another trial on a new indictment, alleging such offense. But on another trial, not only the rights of the public may be protected, but the property of the defendants saved from that total destruction, with which it is threatened by the judgment pronounced in this case. A mill-dam, owned by the defendants, was the nuisance. Whether its demolition is necessary, to get rid of the nuisance, is very doubtful, on the evidence. It would seem, rather, that it could be kept up at some height, so as to furnish water to the defendant's mill, without producing the bad effects complained of. Were the sheriff to execute the precept, he might find it very difficult to decide how much, if any, of the dam, he might allow to remain. But on a new trial, if the defendants shall be convicted of continuing the nuisance, the judgment may be, that only so much of the dam as causes the nuisance be prostrated.

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This may be determined by the jury upon the evidence given upon that question. See 1 *Russell on Crimes*, p. 331.

"As the Oyer and Terminer is a permanent and continuous court, so that each session of such court, in any county, instead of being a distinct and independent court, the existence of which commences the first, and terminates with the last day of the session, is a mere term of the Oyer and Terminer for that county" (*Quimbo Appo v. The People*, 20 N. Y. R., p. 531, SELDEN, J.), the proper judgment at the next session of the court may be pronounced upon the conviction under this indictment.

The judgment of the Oyer and Terminer must therefore be reversed, and proceedings remitted to pass proper sentence.

ALBANY OYER AND TERMINER. October, 1857. Before *Harris*, Justice of the Supreme Court, and *William R. Tanner* and *Farley Fisher*, Associate Justices.

THE PEOPLE v. JOHN FITZPATRICK.

On the trial of an indictment for a personal injury by the husband on his wife, the prosecution cannot be compelled to call the prosecutrix as a witness; but as the wife is a competent witness for the prosecution, she may be called as a witness in behalf of her husband, where the prosecution fails or neglects to call her.

THE defendant was indicted for an assault and battery upon his wife, Sarah Fitzpatrick, with intent to kill her. The evidence showed that the defendant and his wife resided in Lydius street, in the city of Albany; and that on the night of the fourth of July, 1857, after considerable altercation and contention, the defendant was seen, by persons standing on the street, to seize his wife and throw her from the third story window of their residence, from whence she fell on the sidewalk, receiving several terrible wounds. The defendant con-

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tended that his wife was intoxicated at the time, and that she voluntarily threw herself out of the window. No one was present in the room when the transaction took place, except the prisoner and his wife.

The prosecution having called a large number of witnesses as to the transaction, rested, without calling Sarah Fitzpatrick, the wife of the prisoner, who was in the court and in the full possession of her senses.

L. D. Holstein, for the defendant, thereupon moved the court for an order compelling the prosecution to call Sarah Fitzpatrick as a witness, thus enabling the defendant to avail himself of the benefit of a cross-examination, and cited in support of the motion, the case of *Regina v. Holden* (8 *Carrington & Payne*, 606; 34 *English Com. Law Reports*, 917). The counsel for the defendant also contended, that in case such order was refused, the defendant was entitled to the benefit of his wife's testimony, and to call her as a witness on his behalf, on the ground that she was a competent witness against her husband and therefore a competent witness in his favor. In support of this proposition the counsel cited *The State v. Neil* (6 *Alabama Reports*, 685).

S. G. Courtney (District Attorney), for the people.

HARRIS, J. It is true that in England, where private counsel conduct the prosecution of criminal trials, there are cases to be found in which the crown has been compelled to call witnesses whose names appeared on the back of the indictment, or who were shown to have been present at the commission of the offense charged. But in this country no such rule prevails. Here the prosecution is conducted by sworn officers of the State, and the courts will not interfere in their management of the cases presented, upon the presumption that no wrong will be perpetrated by a public officer. We therefore deny the motion of the counsel for the prisoner, to compel the District Attorney to call Mrs. Fitzpatrick as a witness.

We have fully considered the other branch of the proposition and the authority cited by the prisoner's counsel, and find

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that the case in Alabama Reports is well grounded upon principle. We, therefore, decide that the wife of the prisoner is a competent witness for her husband, and may be called on his behalf.

Sarah Fitzpatrick was then called as a witness for her husband, and testified on his behalf.

COURT OF APPEALS. Albany, December, 1859. *Johnson, Comstock, Selden, Denio, Strong, Allen, Gray and Grover*, Judges.

THE PEOPLE, plaintiffs in error, v. LEWIS DIBBLE, defendant in error.

On the trial of an indictment for passing a counterfeit bank note, it is not competent for the prosecution to prove that, two or three days after the transaction in question, the prisoner passed two other counterfeit bank notes to other persons—the said notes not purporting to have been issued by the same bank as the one for passing which this indictment was found, and the uttering of them being in no way connected with that act.

In this case the prisoner was tried and convicted, before the Otsego County Sessions, of forgery in the second degree, for passing to one Newman a counterfeit bank bill, on “the Westfield Bank.” On writ of error to the Supreme Court, the judgment was reversed and a new trial ordered. The case in the Supreme Court is reported in 4 *Park. Cr. R.*, 199.

The cause was removed to this court, by writ of error sued out in behalf of the People.

It was proved on the trial, that the prisoner passed the counterfeit five dollar note described in the indictment to Samuel S. Newman, on the 29th of November, 1858, in payment for cutting a pair of pantaloons, and received from Newman \$4.81 in change.

The court then permitted the prosecution to prove, by Smith Kenyon, against the objection of the prisoner’s counsel, that the prisoner, a day or two after the passing of such note to

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Newman, on his way from his residence to Catskill, stopped at Stevens' tavern, and there bought a ring from a peddler, and gave him a five dollar bill to pay for it. A bystander said the bill was not good, but the peddler said it was good, and took it and gave the change to the prisoner — the price of the ring being two or three dollars. That further on his journey, at Steele's tavern, the prisoner purchased a ring from another peddler for two dollars, and gave the peddler a five dollar bill in payment for it, and received small bills and change for the balance, after deducting the price of the ring. That the last mentioned peddler afterward saw the prisoner at another place, and told him the bill he let him have was bad, and that a postmaster had told him so. That the prisoner thereupon took it back, said "he took it for good money" and returned the ring and bills and change to the peddler, and received from him the five dollar bill.

The witness could not tell the name of the bank by which the bills passed by the prisoner to the peddlers purported to have been issued. The bills were not produced, nor was any evidence given, except as above mentioned, to show that they were counterfeit.

The prisoner's counsel then moved the court to strike out all the evidence relating to these two bills passed to the peddlers, as irrelevant and incompetent, for the reason that it was not proved by what bank they purported to have been issued, or that they were counterfeit, and upon the ground that the bills were not produced. The court denied the motion, and the prisoner's counsel excepted.

It was also proved that two days before the bill in question was passed, the prisoner said he had no money.

L. L. Bundy (District Attorney), for the plaintiffs in error.

The court decided correctly in refusing to strike out the testimony of Smith Kenyon.

This evidence was admissible upon the theory that the bills passed by the prisoner to the peddlers were counterfeit. Proof of the forged notes is admissible. (*Roscoe Cr. Ev.*, 91, 92;

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Hodron's Case, 1; *Lewis*, 65, 103; *Richard's Case*, *Id.*) These bills were returned to the prisoner as bad, and taken back by him as such. But two days before the prisoner said he had no money. He cited, also, *Safford v. The People*, 1 *Park. Cr. R.*, 478; *People v. Finnegan*, *Id.*, 147.

L. J. Burditt, for defendants in error.

The court erred in not striking out the testimony of Smith Kenyon. The bills passed to the peddlers were not produced; no means were used to have them produced, and no evidence given to excuse their non-production. No legal evidence was given that they were counterfeit or forgeries. The presumption is, nothing appearing to the contrary, that they were genuine bills. (3 *Arch.*, 552; *Whar. Cr. L.*, 233, 241; 3 *Greenl. Ev.*, 905, 911; *Cow & Hill's Notes*, 462; 3 *Arch. Cr. Pl.*, 552, *Note*; *The People v. Thomas*, 3 *Park. Cr. R.*, 256.)

By the Court, COMSTOCK, J. The conduct of the prisoner in passing the two bills to the peddlers in exchange for rings, was no doubt suspicious. But those transactions do not appear to have any connexion with the alleged offense, for which he was indicted. The two bills were passed to the peddlers some two or three days after the transaction, for which he was upon trial. It was not shown that the bills were of the same bank as the one in question, nor even that they were counterfeit. One of them was returned to him as bad, whether as uncurrent or as counterfeit, does not appear. He received it back, alleging that he took it for a good bill. This circumstance does not prove that it was a counterfeit, much less, that the prisoner knew that such was the fact. We think, therefore, that these transactions were merely calculated to excite suspicion and prejudice against the prisoner, and had no legal bearing upon the issue which was on trial. It is true the prisoner, some three or four days before the dealing with the peddlers, said he had no money. This circumstance only suggests a doubt whether he came honestly by the bills which he is proved to have had so soon afterward, but it does not

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connect those bills or the uttering of them with the particular offense for which he was tried. We think the Supreme Court were right in granting a new trial.

Order affirmed.

COURT OF APPEALS. Albany, December, 1860. *Comstock, Selden, Denio, Davies, Clerke, Wright, Bacon and Welles*, Judges.

CHARLES M. CONKEY and WALTER HERRINGTON, plaintiffs in error, v. THE PEOPLE, defendants in error.

On the trial of an indictment for rape, after giving evidence of the commission of the offense, it is competent to prove acts of violence to property committed by the defendants in the same room and immediately after the alleged rape, for the purpose of characterizing the transaction.

Where the husband of the prosecutrix was present at the commission of the alleged offense, and was also present, the next morning, when she complained of her treatment to a third person, it was held that it was not erroneous to prove by the husband that he also had made, at the same time, a communication to such third person of what had happened, the details of such communication not having been given in evidence.

Where a witness testified that he had heard three or four persons residing in an adjoining town, but not in the immediate neighborhood of the prosecutrix, speak of her character for chastity, but did not know how she was generally regarded in the community, it was held that the witness was not competent to testify as to the general character of the prosecutrix for chastity.

A witness called to impeach general character, must be able to state what is generally said of the person by those among whom he dwells or with whom he is chiefly conversant.

Where a witness testified that he lived about a mile and a half from the prosecutrix, and said that "he did not know as he had the means of knowing about her character," but afterward said "he thought he was prepared to judge," it was held not to be erroneous for him further to answer, that he considered her general character good, it appearing that the defendants' counsel did not cross-examine him as to the grounds upon which, after first hesitating, he had stated he was prepared to testify.

The indictment contained three counts: first, against both defendants for rape; second, against C. for rape, and H. for assisting him in committing it; third, against both prisoners for assault and battery, with intent to commit a rape.

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The jury returned the following verdict: "They find the prisoners at the bar guilty of the offense charged in the indictment." It was held to be equivalent to a general verdict of guilty, and that upon it the court might properly pass judgment against the defendants on the count charging the highest grade of crime.

An objection that the indictment appeared on its face to have been presented by twenty-four grand jurors, is not available on error, where the defendants pleaded to the indictment, and proceeded to trial without objection in the court below.

THE plaintiffs in error were tried and convicted at the Otsego Oyer and Terminer in December, 1859, upon an indictment for rape, and sentenced to the State prison at Auburn, for ten years and four months each. The indictment contained three counts: the *first* against both for a rape; the *second* against Conkey for the rape, and Herrington for directly inciting and assisting Conkey in the commission thereof; and the *third* against both for assault and battery, with intent to commit rape. On the trial, the District Attorney called Anna Scott, the prosecutrix, and among other things, offered to prove by this witness, that at this time and after the commission of the offense charged in the indictment, the defendant Conkey committed certain trespasses upon the complainant, to wit: that he overturned the stove, threw some meat out of the window, breaking the glass, &c.; to which offer the defendants, by their counsel, objected, and also to all evidence upon that subject, upon the ground that no such offense was alleged in the indictment, and that the evidence was irrelevant, incompetent and immaterial, and was improper against Herrington. The court overruled defendants' objection, and decided that the evidence was competent and proper, to which decision the defendants, by their counsel, excepted.

Witness said: The defendant Conkey knocked a pot of meat off the stove, and threw the meat out of the window; he tipped over the stove and injured the teakettle. Conkey did this alone, Herrington setting on the bed; after Conkey began to carry on too bad, Herrington told him that that would not answer; that he was carrying on too bad; and began to pick up the meat and put it in the pot.

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The district attorney also put to this witness the following question: Did you and your husband go to New Berlin the next day to get a warrant? The counsel for the defendants objected to this question, as incompetent, irrelevant and immaterial. The court overruled the objection, and allowed the question to be answered, to which decision defendants excepted.

Witness said: I did go to New Berlin, and before Esq. Foote, the next day, to get a warrant.

Question by the district attorney: Did you tell anybody of it before Foote? Objected, upon the ground and for the reasons last above stated, which objections were overruled by the court, and the question allowed and the evidence admitted; to which decision the defendants excepted.

The witness said: Mr. Edwards came down Sunday morning to help put up the stove; I did not tell him all that was done; I told him they had abused me.

Thomas Scott, the husband of the prosecutrix, was called as a witness by the district attorney, and, among other things, the district attorney made the same offer of proof in relation to what afterward occurred as is contained in the evidence of Anna Scott, and the prisoners, by their counsel, interposed the same objections thereto, which were overruled by the court, and the evidence admitted, to which decision the defendants excepted.

Witness said: After Conkey got off the bed, he went to the stove and crushed the pot off, and threw two pieces of meat out of the window; he then threw out the griddle and broke out the window, sash and all.

The district attorney also offered to prove by this witness what he (witness) told and related to Harry Edwards, in relation to the transaction in the morning, to which defendant's counsel objected, upon the ground that the evidence is improper, irrelevant and immaterial, and because the defendants, or either of them, were not present, and upon the same grounds upon which similar evidence was objected to in the testimony of Anna Scott; the court overruled the objections and admit-

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ted the evidence, to which ruling and decision the defendants, by their counsel, excepted.

Witness said: I first told Harry Edwards of what had happened Sunday morning; I sent my boy after him; I did not tell him anything about Conkey getting on the bed, but my wife did; she said that they had abused her so that she could not help about putting up the stove.

The defendants called *Perry Medbury*, who testified: I had heard of Mrs. Scott, previous to that; I am acquainted some in her neighborhood; I think I know how she is generally regarded in New Berlin by some of the people; I have heard some of the people in New Berlin, three or four, speak of her character for chastity.

Q. From the speech of people, is her character for chastity good or bad?

This question was objected to by the district attorney, and the evidence excluded, and the objection sustained by the court, to which ruling and decision defendants' counsel excepted.

The witness further said: I don't know how she is generally regarded in the community.

Stephen P. Cady, a witness on the part of the People, testified: I reside one and a half miles from where Mrs. Scott lived a year ago; I am a farmer; I have known them part of the time since they lived in Pittsfield; I think I have heard enough to form an opinion. Defendants' counsel objected to this witness giving any opinion or testifying in relation to the character of Mrs. Scott, upon the ground that he has not shown himself competent to do so. The court overruled the objection, and permitted the witness to testify, to which decision the counsel for defendants excepted. Witness says: In my own mind, her character is good.

Nehemiah Hill, sworn, said: I live in Pittsfield, about one and half miles from Scott; did when this transaction happened; I don't know as I have the means of knowing about her character for chastity; I think I am prepared to judge. Defendants' counsel objected to this witness giving any opinion

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or testifying in relation to her character, upon the ground that he had not shown himself competent to do so. The court overruled said objection, and defendants' counsel excepted. Witness said: I consider it good.

The jury rendered the following verdict: "That they find the prisoners at the bar guilty of the offense charged in the indictment." The *record of conviction* recited that the indictment was found by the oaths of *twenty-four* good and lawful men, the grand jury of the county of Otsego.

The defendants removed the record and bill of exceptions into the Supreme Court by writ of error, where the conviction was affirmed by that court at a general term, in the sixth district, held at Binghamton in July, 1860. The defendants sued out a writ of error to this court.

B. F. Rexford, for plaintiffs in error.

E. Countryman (District Attorney), for defendants in error.

By the Court, CLERKE, J. The conduct of the prisoner, Conkey, immediately after the perpetration of the offense was properly admitted. It characterized the whole transaction, showing, or intending to show, that the carnal knowledge, which he had with the woman, was effected under circumstances of violence and threats, calculated to alarm and terrify her. The whole was one continuous act. Nothing is better established than that the prosecutrix, in trials of this nature, may testify as to what she did or said after the commission of the offense. In the language of Sir William Evans (2 *Ev.*, *Pothier*, 289), "Upon accusations for rape, where the forbearance to mention the circumstances for a considerable length of time is, in itself, a reason for imputing fabrication, unless repelled by other considerations, the disclosure made of the fact upon the first proper opportunity after its commission, and the apparent state of mind of the party who has suffered the injury, are always regarded as very material; and the evidence of them is certainly admitted without objection."

Ordinarily, doubtless, what a witness has said out of court

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cannot be received to fortify his testimony. The principal exception is stated in the above quotation. Thomas Scott, the husband of the woman on whom the offense had been committed, testified that he first told Edwards the next morning, relating no part of his story to Edwards, and then corroborated the statement of his wife, that *she* had complained to Edwards of the manner in which the defendants had abused her. Considering the relation he bore to the prosecutrix; that he was present when she made the disclosure to Edwards, and that he did not give the details of the conversation with the latter, his evidence on this point can scarcely be within the rule disallowing proof of declarations made by a witness out of court, in corroboration of his main testimony at the trial.

Undoubtedly, on the trial of a person charged with rape, the character of the prosecutrix for chastity may be impeached by general evidence. Medbury, a witness called for the defendants, testified that he had heard three or four people in New Berlin speak of Mrs. Scott's character for chastity, but did not pretend to know anything of what the people in her neighborhood said. Cady, a witness called on behalf of the people, and living in her neighborhood, testified that he had heard enough to form an opinion, and he knew the impression of the community was that her character was good.

The witness must be able to state what is generally said of the person by those among whom he dwells, or with whom he is chiefly conversant, for it is this only that constitutes general reputation or character. I think, therefore, that the testimony of Medbury was properly rejected, and that of Cady properly admitted.

Nehemiah Hill, living in the neighborhood of Scott and his wife, first said that he did not know that he had the means of knowing about her character for chastity, but soon after added, "I think I am prepared to judge," and concluded by saying that he considered her character good. The defendants' counsel did not cross-examine him relative to the grounds upon which, after first hesitating, he stated he was prepared to testify. We are not to presume that he was not prepared to judge,

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from being convinced, on further consideration, that he had sufficient knowledge of her reputation among her neighbors. The jury, at the trial of the indictment, found the following verdict: "That they find the prisoners at the bar guilty of the offense charged in the indictment." The charges in the indictment are: 1st. Rape against Conkey and Herrington; 2d. Rape against Conkey, and against Herrington for assisting Conkey in committing a rape; 3d. Assault and battery against both Conkey and Herrington, with intent to commit rape. It is maintained by the counsel for the defendants that the jury have found the prisoners guilty of every one of these offenses, without specifying which, and, therefore, that the verdict is fatally defective. Although this is not the usual way of rendering a verdict in criminal cases, I can discover no substantial difference between it and the ordinary verdict of guilty. Like the ordinary form, it responds in general terms to the indictment, and this constitutes what is termed a general verdict. If the usual verdict of guilty was the form entered in this case, it would not be pretended that the jury might have intended to find the prisoners guilty of the mere attempt at an offense. When a general verdict of guilty is rendered upon several counts in an indictment, relating to the same transaction, the practice is to pass judgment on the count charging the highest grade of offense. (*Whart. Cr. Law*, p. 1037, sec. 3048; *Harmon v. The Commonwealth*, 12 *Serg. & Rawle*, 191.) The verdict is to have a reasonable intendment, and it would be far from reasonable to say, if the jury intended to declare the prisoners guilty of only the inferior grade of the offense charged, that they have not said so, and would not specifically find them guilty of it. To relieve them from the consequences of the higher grade, the jury would unquestionably have employed language expressing that intention, and would have limited their finding to the inferior grade.

The indictment appears on its face to have been presented by the oaths of *twenty-four* good and lawful men, the grand jury of the county, although the statute provides "there shall not be more than twenty-three, nor less than sixteen persons,

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sworn on any grand jury." No indictment can be found, without the concurrence of at least twelve grand jurors; thus requiring that at least a majority of the twenty-three should unite in the finding. In the present case, not only twelve, but twenty-three jurors, summoned as grand jurors, united in finding the indictment; the only error committed was, that one more added his suffrage to that of the necessary number. The defendants suffered no injustice from this; it was an imperfection in a matter of form, which did not tend to the prejudice of the defendants; there was a concurrence in the indictment of more than the law requires. At all events, it is now too late to make the objection. The counsel for the defendants neglected to make it before the Court of Oyer and Terminer, and it is too late to set up the objection after conviction and sentence. (*The People v. Griffin*, 2 Barb. R., 427.) In *King v. Marsh* (1 *Neville & Perry*, 187; 6 *Adolphus & Ellis*, 236; 2 *Bennett & Heard's Leading Cr. Cases*, 317), it was held that "a grand jury ought not to consist of more than twenty-three persons. Where more than twenty-three persons are sworn and sit upon a grand jury, and a bill of indictment is found by them, to which the defendant pleads, and is tried and found guilty, the Court of King's Bench will not, upon *motion*, quash the indictment. If more than twenty-three are sworn and sit upon the grand jury, the defendant, in an indictment found by them, may, if that fact appears upon the caption of the indictment, bring error in law. If it does not appear there, then he may bring error in fact." See also *People v. King* (2 *Caines R.*, 98). The error complained of does not amount to a nullity; it, at most, is an irregularity, not capable now of avoiding the conviction.

The judgment of the Supreme Court should be affirmed. As to the irregularity in the constitution of the grand jury, the court proceeded on the ground that the defendants *waived* it, by pleading and proceeding to trial.

Judgment affirmed.

SUPREME COURT. Broome, General Term, November, 1860.
Mason, Balcom, Campbell and Parker, Justices.

CHARLES NELSON, plaintiff in error, v. THE PEOPLE, defendants
 in error.

Where R. and B., two acting justices of the peace, were designated as members of the Court of Sessions of their county for the year 1860, but when so designated were not, within the requirement of the statute, "entitled to serve as justices of the peace during such year by virtue of the election under which they were acting as such justices at the time of such designation," it was held, that their right to act as justices of the sessions could not be questioned on the trial of an indictment before such court, and that it could only be inquired into on a direct proceeding against them by information in the nature of a *quo warranto*.

The acts of public officers *de facto*, done *colore officii*, under an irregular election or appointment, are valid as respects the rights of third persons and so far as concerns the public.

The public prosecutor may insert several counts in the same indictment alleging the offense distinctly and separately, in various ways, to meet the evidence, and the court will not compel an election between them on the trial.

When the jury render an imperfect verdict, the court may refuse to receive it, and direct them to retire and correct it, and may afterward receive the corrected verdict.

On the trial of an indictment, under chapter 74 of the Session Laws of 1854, it is not necessary for the prosecution to show with what weapon the assault was made or the injuries inflicted. It is sufficient to prove that a *sharp, dangerous instrument* was employed by the prisoner, and the jury have a right to infer such fact from the nature of the wounds.

THIS was a writ of error to the Court of Sessions of Otsego county. It appeared by the return that the following indictment had been found against the prisoner:

State of New York, Otsego County, ss:

At a Court of Sessions, held at the court house, in the village of Cooperstown, in said county of Otsego, the 20th day of February, in the year of our Lord one thousand eight hundred and sixty, before Levi C. Turner, Esq., county judge of the county of Otsego, John W. Richardson and Harvey W. Brown, Esquires, justices of the peace of the county of Otsego, duly designated as members of the Court of Sessions of the said

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county, all justices assigned to keep the peace in and for said county, and also to hear and determine divers felonies, trespasses and misdemeanors in said county committed, the jurors of the People of the State of New York, in and for the body of the county of Otsego, being then and there sworn, and charged on their oath,

Present. That Charles Nelson, late of the town of Cherry Valley, in the county of Otsego, on the 26th day of December, 1859, at the town of Cherry Valley, in said county of Otsego, with force and arms, in and upon one Richard Allanson, then and there being, feloniously did make an assault, and him, the said Richard Allanson, with a certain knife which the said Charles Nelson, in his right hand, then and there had and held, the said knife being a deadly weapon, willfully, maliciously and feloniously, did beat, strike, cut and wound, with intent him, the said Richard Allanson, then and there willfully and feloniously, to kill, and other wrongs to the said Richard Allanson, then and there did to the great damage of the said Richard Allanson against the form of the statute in such case made and provided, and against the peace of the People of the State of New York and their dignity.

Second count. Same, alleging the injury to have been done with a chair.

Third count. Same, with a certain sharp, dangerous weapon, to the jurors unknown.

Fourth count. With a certain sharp cutting instrument, to the jurors unknown, with intent to *maim*.

Fifth count. Same, with a knife.

The remaining counts were as follows :

6. And the jurors aforesaid, upon their oaths aforesaid, do further present that the said Charles Nelson, at the town and county aforesaid, on the said 26th day of December, 1859, with force and arms, in and upon one Richard Allanson, then and there being, feloniously did make an assault and him, the said Richard Allanson, willfully and feloniously did beat, strike, wound and ill treat, with intent, him, the said Richard Allanson, willfully and feloniously to kill, to the great damage of

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the said Richard Allanson, against the form of the statute in such case made and provided, and against the peace of the People of the State of New York and their dignity.

7. And the jurors aforesaid, upon their oaths aforesaid, do further present, that the said Charles Nelson, at the town of Cherry Valley, in the county of Otsego aforesaid, on the said 26th day of December, 1859, with intent, willfully, maliciously and feloniously to do bodily harm to one Richard Allanson, then and there being, and without justifiable or excusable cause in, and upon him, the said Richard Allanson, willfully and feloniously made an assault with a sharp, dangerous weapon, to wit: a certain knife which the said Charles Nelson, in his right hand, then and there had and held, and then and there other wrongs and injuries did to the said Richard Allanson, to the great damage of the said Richard Allanson, against the form of the statute in such case made and provided, and against the peace of the People of the State of New York and their dignity.

8. And the jurors aforesaid, upon their oaths aforesaid, do further present, that the said Charles Nelson, on the day and year aforesaid, at the town and county aforesaid, with intent, willfully and feloniously to do bodily harm to one Richard Allanson, then and there being, and without justifiable or excusable cause in and upon him, the said Richard Allanson, willfully and feloniously made an assault with a certain sharp, dangerous weapon, to the said jurors unknown, which the said Charles Nelson then and there had and held, and other wrongs and outrages then and there did to the said Richard Allanson, to the great damage of the said Richard Allanson, against the form of the statute in such case made and provided, and against the peace of the People of the State of New York and their dignity.

E. COUNTRYMAN, *District Attorney.*

The case came on to be tried at the August term of the Court of Sessions, 1860, for Otsego county, before Hon. LEVI C. TURNER, county judge, and John W. Richardson and Har-

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vey W. Brown, esquires, justices of the peace for said county, and designated as members of said Court of Sessions.

E. Countryman (District Attorney), for the People.

L. J. Walworth, L. I. Burditt and J. A. Lymes, for the prisoner.

Before the jury had been called or sworn, the counsel for the defendant moved the court to quash the indictment, on the ground that the Court of Sessions, as constituted and organized, had no authority or jurisdiction to try the defendant; whereupon the following facts were stated by the justices of sessions, and conceded by the district attorney: The said Harvey W. Brown was duly elected a justice of the peace of the town of Maryland, in said county of Otsego, in March, 1859, for a full term of four years, to commence January 1st, 1860. On the 7th day of November, 1859, Lysander W. Kelly, who was then an acting justice of the peace of the said town of Maryland, having theretofore been duly elected to said office, resigned said office, and said Harvey W. Brown was, on the said 7th day of November, 1859, duly appointed to fill the vacancy occasioned by the said resignation of said Lysander W. Kelly, whose term of office expired on the 31st day of December, 1859; and the said Harvey W. Brown, on the said 7th day of November, 1859, thereupon qualified as justice of the peace under the appointment, and on the 3d day of December, 1859, duly qualified for the full term.

The said John W. Richardson was duly elected and qualified as a justice of the peace of the town of Burlington, in said county, in March, 1855; that his term of office expired the last day of December, 1859; and that in March, 1859, he was again duly elected as such justice of the peace for another full term, to commence the 1st day of January, 1860, and has been an acting justice of the peace of said town since the 1st day of January, 1856.

That on the 8th day of November, 1859, the said John W. Richardson and Harvey W. Brown were designated and elected, in the manner prescribed by law, as justices of the sessions in and for said county of Otsego, for and during the year 1860;

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and the said John W. Richardson and Harvey W. Brown duly took the oath of office, as such justice of sessions, as prescribed by the Constitution, before the 1st of January, 1860.

The above facts were agreed to and conceded by the district attorney and the counsel for the defendant.

And the district attorney here produced and read in evidence, an act of the legislature of the State of New York, passed February 4th, 1860. See *Session Laws*, 1860, p. 22, ch. 16.

The court denied the motion, holding and deciding that the court was properly organized, and had jurisdiction to try the defendant, to which ruling and decision the counsel for the defendant excepted.

Before the jury were called or sworn, and after the district attorney had moved the trial on the indictment, the counsel for the defendant moved the court to quash or set aside the indictment, on the ground, among other things, that several separate and distinct offenses, with different punishments, were charged in said indictment, which motion was denied by the court, and the defendant, by his counsel, excepted.

And the counsel for the defendant then moved the court to compel the district attorney to elect upon which count or charge in said indictment he would try the defendant, which motion was also denied by the court, and the defendant, by his counsel, excepted.

The same motion above stated, and upon the same grounds, as to the jurisdiction of the court, and the form and contents of the indictment, was made by the defendant before pleading to the indictment, with the same ruling and exceptions as above.

After which, the jury being empaneled and sworn, the cause was opened on the part of the People by the district attorney, who stated to the jury that he should not claim that the cuts on the body of Allanson were inflicted with the large bowie knife found in the room where the fight occurred, but that some other sharp instrument was used.

Richard Allanson, called on the part of the People, testified, among other things, as follows: I went into Henry Nelson's saloon, in Cherry Valley, on the night of the 25th day of

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December, 1859, and sat down there; defendant came down there, and said he could whip any man, or any two men, who insulted his woman; after some conversation, I told defendant I thought he could not whip me; he said he could, or would, and if I would step out in the street he would try, and we went out; defendant then said he would not fight any more in the street, but would go into a room, where we could fight it out alone; we concluded there was no room to be had that night, and so we agreed to meet the next morning at 9 o'clock, at Henry Nelson's saloon.

I went back to the saloon the next morning as agreed, about 9 o'clock, and sat down, and was there about 10 minutes before defendant came in; when he came in, he said good morning Dick, and I said good morning to him; he then said the time is most up; he said he did not know where we could get a room, unless we went to John Story's; I told him I thought we could get a room nearer by, and then one of us said let's go and see, and we started out and went toward Bates' building, and we went up in the third story; the door was locked; I said I will go and get the key to Kinne's shop; I went then and saw Kinne and asked him for the use of that room for a few minutes, and Edward Peatt took the key and unlocked the room, and we all three went in; Peatt said, well, I guess you won't want me here, and went out; Nelson took the key and locked the door, and we both stepped into the bed room joining, and took off our coats, and came out in the main room. Nelson asked if the harness should be removed, and the stove and chairs; I said no, there will be no necessity for removing any thing but the chairs; I then took hold of one or two chairs and walked into the bed room and set the chairs down and turned to come out, and that was the last I knew; the next I recollect of, was being at home at my father's house; the first day I remember of, after that day, was the 14th of January; this fight occurred on the 26th day of December, 1859; my father lives about a mile from the village, and is a farmer; defendant is not a married man; I understood we were to have a fair *knock* down.

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De Witt C. Bates, testified among other things as follows: On the 26th day of December last, I went to my office at 9 A. M.; I heard a noise above pretty heavy and solid like throwing down a heavy body on the floor; it attracted my attention, then I heard a most unearthly and terrible groan, a forced groan, between a loud scream and a groan, I listened an instant, and heard it once or twice; I went up stairs into the third story; I went to the door, which was locked, heard no answer, when I called to him again to open the door; while I was at the door Mr. Cooper came up and suggested breaking open the door, and we broke it open and both entered the room; Allanson's head lay within a few feet of the door; I did not know him, his face and bosom were covered with blood; his face was badly disfigured; he was apparently dead; I had known Allanson from his boyhood, but I did not know who this person was on the floor until defendant spoke his name; there was a spasmodic action of his head and breast; defendant then stood in the middle of the room, covered with blood, and said, I have done it, I have whipped him, it was fair play; ask Dick, and he will say so; the sheriff then came in and took defendant out of the room; Nelson was taken before a justice of the peace, and I appeared and made the complaint; after the defendant left the room I saw a large knife; Judge Clyde held it in his hand when I first saw it; I did not see Allanson again for a long time; there was a chair in the room near where Allanson lay, a windsor chair, plank bottom; I discovered small spots of blood, under the bottom of the chair and on the rounds.

George C. Clyde, called for the People, testified, among other things, as follows: I went up to the room after the affray was over, and found a man there called Allanson, and the doctor; I felt something under the carpet in the bedroom with my foot, and stooped down and picked it up and found it was a large knife. The knife was here produced and identified by the witness as the one he found; witness said he handed it to Dr. Merritt. Nelson was present when the knife was produced before Esq. McLean.

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George Merritt, called, testified: I live at Cherry Valley; am a physician and surgeon; saw a wounded man, Allanson, at the house of Mr. Bates shortly after the fight; there were three or four wounds on his face; there were two under the right eye and on the right side of the upper lip, and a very slight wound across the nose; the wounds under the eye were nearly parallel with each other, extending round near to the corner of the right eye, and near one-fourth of an inch apart, circular form like a half moon; they appeared one and one-fourth inches long; the depth of the wounds was from a quarter to half an inch; the face was swollen; the wounds under the eye looked like cuts made by something, I do not know what; they were not bruised cuts, but appeared to me to be cuts, clean cuts. The lip was cut perpendicular, which appeared to be made with same thing as the cuts under the eye, and the cut across the nose very slight; did not bleed; in my opinion the wounds under the eye and on the lip could not have been made with the naked fist; they were made with a cutting instrument; no other wounds in the shape of cuts; the face was bruised and swollen a good deal; the eyes were closed, not blind; there was a swelling or ridge on the back part of the head; I saw some marks or wounds on the shoulders, on the point of each; two or three scratches on the throat; seemed to have been made by finger nails; he was not sensible, but he could be roused by special effort; I treated him, perhaps, two weeks or less; in five or six days he was convalescent; he was considerable delirious; I afterward measured the chair in the room where the fight occurred, and the distance between the hind legs corresponded with the distance between the marks on the shoulders of Allanson; the chair I measured was an old plank bottom windsor chair; defendant asked me if the wounds were made by a ring on his finger; I told him I thought they were not; he, defendant, said he knocked Dick down, and that he held Allanson by the hair of his head on his knee, and struck him with his right hand in his face.

Cross-examined: Defendant said they squared off for a fair

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fight, and struck at each other, and Allanson did not hit him, but that he knocked Allanson down with his fist, and then drew his head upon his knee and struck him with his right hand in the face; this was at the time the defendant was claiming that the cuts were made with the ring; defendant showed me his right hand after the occurrence; it was swollen; defendant said the agreement was that when either called out enough, they were to stop, and said that it was a fair fight between two gentlemen; I was sworn before the justice, and testified that they were not made by the fist; these cuts could have been made by a dull knife; the depths of the wounds were a bad thing to judge of, for the reason that they were swollen badly; the face was badly beaten and discolored; the wounds healed up readily.

William Bastian, called by the People, said: He lived in Cherry Valley; knew the defendant, and made the knife shown in court, for defendant, at his request; it was intended for a bowie-knife; I have seen it in defendant's possession at different times since.

The district attorney here rested and the defendant called *Edward Peatt*, who testified: I roomed in the building where the fight was; in the morning about 9 o'clock, Allanson came to my room and wanted to know if he could have the use of the room for fifteen minutes; I told him I had nothing to do with the room; Mr. Kinne then came in, and Dick asked him if he could have it; Kinne said yes, and told me to take the key and unlock the door; I unlocked the room, and defendant and Allanson went into the room with me; the chairs were taken out of the room; Charlie carried some out, and I carried one out; I think all the chairs were carried out, but I will not be certain; the first thing Allanson did was to take off his clothes, and he laid them on a table in the square room; Charlie took off his coat and vest, and then I saw him take an instrument out of his pants and throw it on the bed; Allanson then stood out in the square room, and Charlie was in the bed room; we all went out in the square room; defendant spoke and said, "Ed., are you going to stay?" I said no,

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and handed him the key and then left; Charlie had on a ring at the same time; the ring appeared more like a square top than this, the one shown me now by defendant; this ring now shown me he had worn for the last 15 months; this ring shown to me does not look like the same ring he then wore; that was more of a square top ring; I did not notice anything else on his hand or in his hand; the next I saw of Allanson was after the fight, and he was lying on the floor.

Cross-examined: I do not recollect of seeing a chair in the room after the fight; I think there were five or six chairs in all, in the room; I don't mean to be understood that all the chairs were taken out.

John Hubbard, called for the defendant, testified, among other things, as follows: I went to the room after the affray; I asked Allanson if there was any foul play or anything wrong; if it was all fair; he said it was all fair, just as they had agreed upon.

Phillip R. Wales, called by defendant: I was deputy sheriff when this transaction took place; I arrested defendant in the room where the fight took place; the night after the fight took place, the right hand of the defendant was badly swollen and inflamed; he took dinner with me that day; I had to cut his meat for him, and pour out his coffee; he could not use his hand; there was a scratch on his right hand, and a mark on his nose; there was skin broken on the ridge of his nose; he had a ring on his finger when I arrested him; this is the ring; I have no doubt of it.

Cross-examined: I did not notice the ring on his finger until in the evening of the same day of the fight, when he went to bed; that is the first I saw of the ring; I do not know that he had the ring on when I arrested him; he was away from me several times during the day, fifteen minutes to a time.

Davis W. Bates, called on the part of the people, testified: I heard defendant say the same day of the fight, that Allanson was a pretty man to go into a room to fight, as he had not got a clip at defendant.

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The cause was then and there rested, and the district attorney stated that he would not insist to the jury, on the evidence in the case, upon a conviction of the defendant for an assault with an intent to kill or maim as alleged in the first six counts in the indictment, but he declined to abandon the counts in any manner, insisting that the defendant, under those counts, could be convicted of the minor offense of assault and battery, or under the statute of 1854.

Whereupon, and after the argument of counsel, his honor, L. C. TURNER, presiding judge, proceeded to charge the jury, and among other things as follows :

"The defendant is indicted for an offense of no ordinary character, at least in this county, and, although the evidence discloses a disgusting and brutal scene, it should not divert your minds from the impartial consideration of the real issue presented for your determination.

The indictment contains several counts; the district attorney, however, does not ask a conviction for a felony, as charged in either of the first six counts, but he asks a conviction upon the 7th and 8th counts, and insists that the defendant is guilty of the minor offense of a simple assault and battery in any event, and under any and all of the counts of the indictment.

The major offense, and the only one charged in the indictment which you are to pass upon, is for a violation of the law of 1854, which declares that any person, who, with intent to do bodily harm, and without justifiable or excusable cause, shall commit an assault upon the person of another with any knife, dirk, dagger or other sharp, dangerous weapon, shall, upon conviction thereof, be punished by imprisonment in a State prison for a term not more than five years, or by imprisonment in the county jail for a term of not exceeding one year.

You will, therefore, first consider and determine from the evidence that has been submitted to you, whether or not the defendant (Nelson), with intent to do bodily harm, and without justifiable or excusable cause, did commit an assault

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upon the person of Allanson with any knife, dirk, dagger, or other *sharp, dangerous weapon*.

It is not disputed, indeed it is conceded, that these parties mutually agreed to go into a room and have a "fair fight;" that they did go into a room, lock themselves therein, and the result was that Allanson was dreadfully injured, and the defendant unhurt.

It is a disturbance of the public peace, promotive of disorder, violence and immorality, and a violation of law for two persons, by mutual agreement, to lock themselves into a room and fight; but the defendant is not guilty of the major offense as charged in the 7th and 8th counts of the indictment, although he intended to do bodily harm, and without justifiable or excusable cause, unless he committed the assault upon the person of Allanson with a *sharp, dangerous weapon*, no matter how badly Allanson may have been beaten, bruised and disabled; unless the assault was committed with some *sharp, dangerous weapon*, the defendant is not guilty.

The only evidence as to what took place immediately preceding the fight is that given by Allanson and Peatt (which was read by the judge to the jury), and there is no positive evidence that any *sharp, dangerous weapon* was used; that such a weapon was used is only to be inferred from the wounds inflicted as described by the witness, Dr. Merritt. (The evidence of Dr. Merritt was read by the judge to the jury.)

You will therefore carefully scrutinize, and impartially consider the evidence before you, and if you determine therefrom that the defendant did assault Allanson with intent to do him bodily harm, and without justifiable or excusable cause, with a *sharp, dangerous weapon* as charged in the 7th and 8th counts of the indictment, or either of them, then you will render a verdict of guilty; but if you do not so determine or entertain a reasonable doubt in relation thereto, then render a verdict of not guilty.

Should you find that the defendant is not guilty of the major offense as charged in the 7th and 8th counts, then you

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have the right, should you regard the evidence as warranting it, to find the defendant guilty of a simple assault and battery.

And as regards the commission of this minor offense, I charge you as matter of law, that, if the defendant and Allanson, by mutual agreement, went into the room to fight, and the defendant struck Allanson first, he is guilty of an assault and battery. That if Allanson struck the first blow, and the defendant only used sufficient force and no more than was necessary to defend himself, then he is not guilty, but although Allanson did strike first, and the defendant used more force and violence than was necessary to protect and defend himself, then he is guilty of an assault and battery."

The jury thereupon retired under the charge of a constable duly sworn, and afterward returned into court, and the foreman of the jury, in the presence of the defendant, handed the clerk their verdict in writing, which the clerk read as follows:

"We find the defendant guilty of assault and battery, with intent to do bodily harm with some sharp, dangerous instrument."

The court refused to receive said verdict, and directed the jury to amend their verdict, and if they intended to find the defendant guilty of the offense charged in the 7th and 8th counts in the indictment, to reconsider their verdict and to respond directly to these counts, to which refusal to receive, and direction to amend, the counsel for the defendant excepted. Whereupon the jury consulted together in the box without leaving court, and after such consultation, the foreman announced that the jury could not agree to find the defendant guilty under the seventh count, which had been read to them, and the court directed them to retire again, to which the defendant, by his counsel, excepted.

The jury again retired, under the charge of the same constable, duly sworn as aforesaid, and after being absent about twenty minutes, returned and rendered the following verdict, in the presence of defendant: "We find the defendant

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guilty of the offense charged in the eighth count of the indictment."

The counsel for the defendant then moved the court in arrest of judgment, upon the grounds stated in the motion to quash the indictment, for the reason that the court was not properly constituted, and also on the ground that no offense was charged in the eighth count in the indictment, which motion, so made, the court overruled, to which decision the counsel for the defendant excepted.

The prisoner was sentenced to imprisonment at hard labor in the State prison at Auburn, for two years.

The cause was argued in this court, on the bill of exceptions brought up by the writ of error, by

James A. Lynes, for the plaintiff in error, and

E. Countryman (District Attorney), for the People.

The Supreme Court, after advisement, decided that the right or title of the justices of sessions to their office, could not be collaterally inquired into, but only by a direct proceeding against them by information, in the nature of a *quo warranto*; and that no error had been committed on the trial, and affirmed the judgment of the Court of Sessions.

Judgment affirmed.

NEW YORK GENERAL SESSIONS. April Term, 1838. Before
Richard Riker, Recorder.

THE PEOPLE v. RICHARD K. FROST.

The object of an arraignment of a defendant, is to establish his identity. It is not indispensable to a valid arraignment, that the defendant should be called to the bar of the court, to answer the matter charged upon him in the indictment; and that, when so brought up, he should be called upon, by name, to hold up his right hand. Any other acknowledgment of identity will answer the purpose as well.

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Where the prisoner actually appeared and held up his hand, and thereby, and by subsequent acts, admitted his identity, it was held, on motion in arrest of judgment, to be a valid arraignment.

Where a defendant had been duly arraigned, and by acts, if not by words, had demanded a trial, and had procured the cause to be set down for trial, and had challenged jurors, produced witnesses, and examined and cross-examined witnesses on both sides, and had summed up the case to the jury, after a verdict of guilty, a motion in arrest of judgment, on the ground that a formal plea of not guilty had not been put in, was denied.

Where, on the trial of an indictment for manslaughter in the fourth degree, which lasted several days, the jurors were allowed to separate by consent of parties, after a verdict of guilty, the judgment will not be arrested on affidavits proving expressions used by one of the jurors, both before and during the trial, tending to show bias against the defendant, where the allegations are fully met and repelled by the affidavit of the juror assailed, and where, during the whole trial, the jury appeared to be attentive, patient and exemplary.

THE defendant was indicted for manslaughter in causing the death of one Tiberius G. French. The evidence showed that the defendant was a physician of what was called the Thompsonian school, and that the death of French was caused by improper medical treatment, and particularly in the immoderate use of lobelia (known as Indian tobacco), and of the steam bath. The jury found the defendant guilty of manslaughter in the fourth degree, under that provision of the statute that declares that when death is caused "by the act, procurement or culpable negligence of another," it shall be deemed manslaughter in the fourth degree. The defendant thereupon moved in arrest of judgment, and also for a new trial, for reasons set forth in the opinion of the court, delivered by recorder Riker, presiding justice, after full argument.

T. Phoenix (District Attorney), for the People.

David Paul Brown, for the defendant.

BY THE RECORDER. The defendant in this case was indicted for manslaughter in the first degree, in feloniously causing the death of one Tiberius G. French, on the 10th day of October, 1887, by administering to him deleterious and poisonous vegetable herbs and other things and decoctions, drank therefrom,

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and for ignorantly and unskillfully administering the same. One of those vegetable herbs, and perhaps the most powerful and pernicious, was upon the trial denominated before the court and jury to be *lobelia*, or, in common language, Indian tobacco. It is unnecessary here to go through the process used by the defendant in administering his medicines to Tiberius G French. After a protracted trial of ten days, in which much evidence was given on both sides, and the counsel fully heard before the court and jury, a verdict of guilty was rendered against Frost, for manslaughter in the *fourth* degree. It is now moved to set aside the finding of the jury on the following grounds:

I. That the defendant was not legally arraigned.

II. That he never legally pleaded to the indictment.

III. That James E. Wood, one of the jurors, had expressed himself before, and pending the trial, if not hostile to the defendant's practice, hostile to the herbs used by him and especially that *lobelia* is a poison.

As to the first objection to wit: that the defendant was not legally arraigned, it is only necessary to know the legal object of an arraignment to answer that question. Sir William Blackstone says (4 *Com.*, p. 322): "To arraign is nothing else but to call the prisoner to the bar of the court, to answer the matter charged upon him in the indictment" (2 *Hale, P. C.*, 216); when brought to the bar "he is called upon by name to hold up his hand. "However," adds the learned writer, "it is not an indispensable ceremony, for, being calculated for the purpose of identifying the person, any other acknowledgment will answer the purpose as well." (4 *Black.* 323.)

In this case Frost was actually put to the bar, he actually held up his hand, and thereby, as well as by subsequent acts, admitted his identity. The objection therefore raised by his learned counsel, that he was not legally arraigned, falls to the ground.

The second objection is that he never legally pleaded to the indictment. Much reliance was placed, to sustain this objection, on the decision of Ch. J. PARSONS, and the other judges

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in the case of *The Commonwealth of Massachusetts v. William Hardy* (2 Mass. R., 303, 317).

Hardy was indicted for the murder of an infant. He was arraigned and pleaded before *one* judge only. The act of 15th March, 1805, under which he was tried, "provided that all indictments for *capital offenses*, shall be heard, tried and determined *exclusively* when three or more justices were present." (2 Mass. R., 315.) Hardy had never been arraigned or pleaded before any competent tribunal, for he never was either *arraigned* or *pleaded* when three or more judges were present. It is true he exercised the right of challenge and was fully defended by counsel. He was convicted. Chief Justice PARSONS took the distinction between *capital offenses*, that is offenses punished with death, and those of an inferior grade. His language is: "We are all of opinion, that the power of hearing, trying and determining an indictment *for a capital offense*, includes a power to arraign a prisoner and to record his plea" (p. 316). The verdict was set aside and a new trial granted, the chief justice saying, "if quibbling is at any time justifiable, *certainly a man may quibble for his life.*"

In the case, however, of *The People v. Ransom*, in our own State, reported in 7 Wend. R., 416-429, where the prisoner was tried and convicted of murder, the court refused to set aside the verdict, though the clerk had not put into the ballot box the names of all the jurors, as he is directed by statute to do, the court saying that "whatever irregularity, therefore, there may have been in this case, it is most evident that it has not affected or prejudiced, in any manner, the rights of the prisoner, and that he is not, according to the best established principles, entitled to a new trial." (7 Wend. R., 429.)

In the case now before the court, there is another view to be taken. Frost was clearly duly arraigned before a court of competent jurisdiction. It is not necessary he should plead not guilty. It is enough for him to demand a trial. (2 R. S., 611, 2d ed.)

Surely this demand to be tried may be by acts, or words, or both. Frost's counsel set down the cause for trial. Frost

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appeared and ratified the act of his counsel. He, with his counsel, challenged jurors, produced witnesses, examined and cross-examined them on both sides, summed up fully and at great length. Surely this is equivalent to the most formal demand to be tried.

This cause may be placed in another point of view, and which will remove all doubt. It may be treated as a *misdemeanor* or a felony. Manslaughter in the fourth degree may be punished "by imprisonment in a State prison for two years, or in a county jail not exceeding one year, or by a fine not exceeding \$1,000, or by both such fine and imprisonment. (2 R. S., 552, 2d ed.)" Now it is clear that this court may, in its discretion, treat the offense of Frost as a *misdemeanor* or a felony. If treated as a *misdemeanor*, the party may appear and plead by counsel, and be tried in his absence, as was done in the case of *King v. Th. Paine*. Mr. Erskine defended Paine, though he was absent in France.

On all these grounds the second objection must be overruled.

We come now to the third objection, to wit: that Mr. Wood, one of the jurors, had expressed himself, before and pending the trial, hostile to the defendant's practice. There is no doubt that every juror sworn to decide a cause, especially in a criminal one, should be superior to all and every unworthy bias or partiality. In this case, the jurors were allowed to separate by the consent of all parties. It is true that two witnesses have attempted to assail Mr. Wood—one by stating what he had said *before* the trial, one while the trial was pending, but it is equally true that Mr. Wood most fully, under his oath, meets and repels the charges. The entire conduct of Mr. Wood, and of all his fellow jurors, throughout the whole hearing of this long and arduous cause, was most scrupulously correct and discreet. They were attentive, patient and exemplary. There being no authority in the books for interference,

¹ But it was held in *The People v. Van Steenburgh* (1 Park. Cr. R., 39), that such an offense is within the statutory definition of a felony.

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where a juror negatives, upon his oath, the imputation of partiality (*Graham on New Trials*, 129), the court overrules that objection also, and nothing now remains for the court but to pass judgment.

The court had originally thought that public duty demanded that Frost should be subjected to imprisonment, but after due deliberation, considering that the legislature have sanctioned the practice, in the healing art, of using herbs, the growth of our own country (1 *R. S.*, 2d ed., p. 451), and by men however uneducated and ignorant, and this being the first conviction for manslaughter, under a system deemed by the court, upon the proof before it, pernicious and dangerous to human life, we have concluded that a fine, and a moderate fine, will answer all the ends of public justice—the court reserving a severe punishment for any future crime of a similar character.

The judgment of the court is, that Frost pay a fine of \$250, to stand committed until such fine be paid.

SUPREME COURT. Onondaga General Term, July, 1860. *Allen, Mullin and Morgan*, Justices.

THE PEOPLE v. JOHN McCLOSKEY.

A conviction for petit larceny before a Court of Special Sessions, is no bar to a subsequent conviction for burglary, where the prisoner is charged with breaking and entering a building with the intent of stealing therein, though the intent charged relates to the same larceny for which he had previously been convicted.

In an indictment for burglary, the prisoner was charged with having broken and entered "the storehouse building of the Gulf Brewery, in which said storehouse building, goods, chattels, personal property, beer, ale and other valuable things were kept for use, sale and deposit, with intent," &c., &c. It was proved on the trial that the Gulf Brewery was a corporation occupying a room in the basement of the court house, which it had thus occupied for several years for storing beer, by the consent of those having the supervision

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of the building, and that such room was separated from other rooms in the basement by partition walls with doors which were kept locked, the keys remaining in the possession of the agents of the corporation. The prisoner entered the basement through an open window into a hall occupied for public purposes, and thence entered the room, occupied by the Gulf Brewery, by breaking through the door. It was held that the proof sustained the indictment, that the room broken into was properly described as the storehouse building of the Gulf Brewery, and that the prisoner was guilty of burglary in the third degree.

THE defendant was indicted for burglary in the third degree, for breaking and entering, with felonious intent, a room in the basement of the court house in Utica, used by the "Gulf Brewery" for storing of beer. The entry into the basement was through an open window into a room used for county purposes, and thence into the room occupied by the "Gulf Brewery," by breaking a lock fastening and door leading from that room. The prisoner had been convicted of petit larceny for stealing beer upon the occasion of the burglary, and this conviction was alleged in bar of the conviction for the higher offense. The prisoner was convicted of the burglary at the Oyer and Terminer, in Oneida county, in June, 1860, and the indictment and the bill of exceptions taken to the rulings and decisions of the court upon the trial, were removed to this court by *certiorari*.

C. A. Mann, for the defendant.

H. T. Jenkins (District Attorney), for the People.

ALLEN, J. The conviction for petit larceny before the Court of Special Sessions, constituted no bar to the indictment for burglary. The two crimes are entirely distinct. The court before which the first conviction was had, had no jurisdiction of the higher offense, and consequently a conviction or acquittal for the burglary would have been void as *coram non judice*. As the prisoner could not have been convicted of the burglary before the Court of Special Sessions, he cannot, upon being arraigned and tried upon an indictment,

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in a court having jurisdiction, allege that he is "twice put in jeopardy for the same offense." Where the indictment is defective, the plea of *autrefois acquit* is no bar to a second indictment. (*People v. Barrett*, 1 Johns. R., 66.) A portion of the court cannot hold pleas of the offense. A conviction or acquittal will be no bar to a second indictment. (1 Russ. on Cr., 836.)

Again, the offenses are not the same. Upon evidence which would sustain the indictment for burglary, the prisoner must have been acquitted of the misdemeanor. Unless the first of two indictments is such that the prisoner might have been convicted by proof of the facts contained in the second, an acquittal or conviction on the first is no bar to the second. (*Commonwealth v. Roby*, 12 Pick. R., 496; *Burns v. The People*, 1 Park. Cr. R., 182.)

The offenses (petit larceny and burglary) are distinct in their legal character, and in no case could a party indicted for the first be convicted of the second. (1 Russ. on Cr., 829.) The acquittal or conviction on an indictment, in order to be a good defense to a subsequent indictment, must be for the same identical offense charged in the second indictment. (1 Russ. on Cr., 836; 4 Bl. Com., 336.)

The demurrer to the plea of former conviction for the same offense was properly allowed.

As the prisoner, after judgment upon the plea, elected to plead not guilty and go to trial upon that plea, the plea and demurrer and judgment thereon properly constituted no part of the record before us. But I have thought proper, nevertheless, to consider the question raised by the demurrer, and think it was properly disposed of by the Oyer and Terminer.

In the fifth count of the indictment, the prisoner is charged with having broken and entered "the storehouse building of the Gulf Brewery, in which said storehouse building, goods, chattels, personal property, beer, ale and other valuable things were kept for use, sale and deposit, with intent," &c. Upon the trial, the "Gulf Brewery" was proved to be a corporation, having its place of business at Utica, and the premises

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broken into consisted of one or more rooms in the basement of the court house in Utica, which for several years had been, with the acquiescence and assent of those having the supervision of the building, occupied by the "Gulf Brewery" for storing beer, and which were separated from the other rooms in the basement by partition walls, with doors which were kept locked, the keys remaining in the possession of the agents of the corporation.

The possession of these rooms by the corporation had been exclusive, and the alleged burglary consisted in breaking the door leading into these apartments, the prisoner having gained access to the basement through an open window into a hall or wood room, occupied for public purposes.

At common law, burglary could only be committed in respect of a dwelling house. A burglar is defined to be "he that by night breaketh and entereth into a mansion house with intent to commit a felony." It might be by breaking in from the outside, or, having gained an entrance, by breaking an inner door. (4 *Bl. Com.*, 224, 226; 1 *Russ. on Cr.*, 785, 790.)

The breaking into a shop or warehouse was not burglary, but if a barn, stable, or warehouse, were parcel of the mansion house, and within the same common fence, though not under the same roof or contiguous, a burglary might be committed therein. (4 *Bl. Com.*, 225; 1 *Russ. on Cr.*, 799.) So there might be several mansions or dwellings under the same roof, and all accessible by the same outer door, and by a common hall. A chamber in a college, or an inn of court where each inhabitant hath a distinct property, is to all purposes the mansion house of the owner. (1 *Hale P. C.*, 556.) So also is a room or lodging in any private house, the mansion, for the time being, of the lodger; if the owner doth not lodge in the house, or if he and the lodger enter by different outer doors. (*Id.*) So also, a parcel of a dwelling house might be so separated from the rest as not to be the subject of a burglary. If I hire a shop, parcel of another man's house, and work or trade in it, but never lie there, it is no dwelling house, and by the common law, no burglary can be committed therein;

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for, by the lease, it is reserved from the rest of the house, and therefore is not the dwelling house of him who occupies the other part. (1 *Hale P. C.*, 558; 1 *Russ. Cr.*, 799.) It was the separate occupation of several tenants or lodgers in the same house, or the character of the occupation of different parts of the same house which, in the former case, gave to the several parts of the same building the character and privilege of several mansions or dwellings, and in the other, took from the parcel separated from the other parts of a dwelling, its peculiar character. A lease of a part of a dwelling house for a shop or warehouse, made that part a shop, so that it was not within the protection given to dwelling houses, but it was necessarily within the protection given to shops, and when, by statute, a forcible breaking into a shop was made burglary, it was a shop within the provision of the act. In other words, being a shop for one purpose, it was a shop for all purposes. A building could, therefore, in its different parts, be occupied by several persons for shops or warehouses, and each distinct occupation be the subject of a burglary. The occupation of a parcel of a building is none the less distinct and exclusive, because it is occupied as a shop or warehouse, rather than as a lodging or sleeping place. In the one case it is the dwelling house of the lodger, in the other, it is the shop or warehouse of the occupant.

It follows that, in this case, the rooms exclusively occupied by the "Gulf Brewery," were the "storehouse" of that company, and, as they had the peaceable possession of the premises, their possession and property, were within the protection of the same, and whether they could have held possession against the public, is not material. The statute of this State prescribes the cases in which an individual being within or entering a house, not having entered burglariously, may, by breaking an inner door, be guilty of burglary. (2 *R. S.*, 668, §§ 14, 15.) By § 20 it is declared that the breaking of an inner door of a dwelling house shall, in no other case, constitute burglary. But this statute does not touch the case of separate dwellings under the same roof, and hence the case of *People v. Fralick*

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(*Hill & Den.*, 63), does not affect the question before us. Bumpus was the occupant of the whole mill. There was no separate occupation of a part by another individual, so as to make the part entered through the trap door a separate shop, or warehouse, or mill. The well established principle that there may be several dwelling houses under the same roof, when different rooms or sets of rooms, are occupied by different tenants, the outer door or hall being common to all, is reaffirmed in *People v. Bush* (3 *Park. Cr. R.*, 552). The Revised Statutes (2 *R. S.*, 669, § 17), provided for a class of cases for which there was before no law in this State, and it made the breaking and entry in the day or in the night time, of any shop, store, tent, booth, warehouse or other building, in which any goods, &c., should be kept, &c., with intent to steal, &c., burglary in the third degree. The apartments occupied by the "Gulf Brewery," were within this provision. The door which was broken by the prisoner, was an outer door of the storehouse, and he was rightfully convicted. The indictment, bill of exceptions, and all proceedings must be remitted to the court below, to the end that judgment be rendered. (2 *R. S.*, 741, § 25; 11 *Wend. R.*, 568.)

MULLIN, J., concurred; MORGAN, J., dissented.

SUPREME COURT. At Chambers, City of New York, August, 1860. *Sutherland*, Justice.

THE PEOPLE v. JAMES DIVINE.

Where, on the return to a writ of *habeas corpus*, the imprisonment was justified under a commitment in due form, by which it appeared that the prisoner had been regularly tried and convicted of petit larceny, before a Court of Special Sessions, held by three police justices, it was held to be competent for the prisoner's counsel to prove, by evidence *abundant*, that only two of the police justices were, in fact, present when the prisoner was arraigned and pleaded,

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and when he was tried and sentenced, for the purpose of showing that the proceedings before the Court of Special Sessions were *coram non judice* and void.

There must be three police justices to hold a competent Court of Special Sessions in the city of New York. The forty-eighth section of the act of the legislature of April 14, 1857, is, so far as it affects this question, repealed by the eighth and ninth sections of the act of April 16, 1858. And where it appeared that a conviction had taken place before two police justices only, under which the defendant was imprisoned, he was discharged on *habeas corpus*.

JAMES DIVINE was sent to Blackwell's Island on a charge of petit larceny, the conviction having been had at a Court of Special Sessions, held in the city of New York by two police justices. His counsel had him brought up on *habeas corpus*, and asked for his discharge, on the ground that he had been illegally convicted. It was claimed that to give a Court of Special Sessions jurisdiction, it must be held by three justices.

Phillips & Stuyvesant, for the Prisoner.

John Sedgwick (Assistant District Attorney), for the People.

SUTHERLAND, J. The warden or keeper of the penitentiary, to the writ of *habeas corpus*, returns a copy of the commitment under which the prisoner was received into his custody, and by virtue of which he is held and detained. The commitment is in due form, and regular on its face. By it, it would appear that the prisoner was duly convicted of the crime of petit larceny, at a Court of Special Sessions of the peace, held by three police justices—Quackenbush, Kelly and Steers—on the 31st day of July, 1860, and that upon such conviction he was ordered and adjudged to be imprisoned in the penitentiary for the term of three months.

It was alleged on behalf of the prisoner, by way of a traverse of this return, that the said Court of Special Sessions, at which the prisoner was tried and convicted, was in fact held by two of the police justices only, viz: Justices Quackenbush and Steers; that Justice Kelly was not, in fact, present when the prisoner was arraigned, tried or sentenced; and proofs

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were offered *aliunde* the commitment or return to prove such allegations.

These proofs were objected to by the assistant district attorney, on the ground that in this *habeas corpus* proceeding I could not go behind the commitment; that it was of the nature of final process and could not be impeached in this proceeding. He also insisted that two police justices were authorized to hold a Court of Special Sessions, and, therefore, that the allegations and the proofs thereof were immaterial.

The proofs were received and the questions reserved.

No objections were made by the assistant district attorney to the form of the proofs.

It is conclusively shown, by several affidavits of parties present at the trial, and by the certificate of the clerk of the said Court of Special Sessions, that the said court, at which it is alleged the prisoner was so tried and convicted, was in fact held by only two justices; that Justice Kelly was not present when the prisoner was arraigned or pleaded, or when he was tried or sentenced.

The questions, then, are:

1st. Has the prisoner a right in this proceeding thus to impeach the commitment?

2d. If he has this right, do the facts shown by the affidavits and the certificate of the clerk of the Court of Special Sessions, so far impeach the commitment and the jurisdiction of the court which tried and sentenced the prisoner as to entitle him to his discharge?

I think that both questions must be answered in the prisoner's favor.

If two justices could not legally hold a Court of Special Sessions, but it took three to constitute such court, then the trial, conviction and commitment of the prisoner were absolutely void; for then the alleged court that tried and sentenced him was not a court, and the two justices who tried and sentenced him had no jurisdiction whatever, and the prisoner was and is unlawfully imprisoned.

Now, it is the very office of the writ of *habeas corpus* to

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ascertain whether the prisoner is unlawfully imprisoned—and how could the prisoner in this case show that the court was illegally constituted and had no jurisdiction, except in the way he has done, by proof *akunde* the return or commitment?

The prisoner could hardly estop himself from the right of showing at any time, and at all times, a total want of jurisdiction.

It is plain by authority, as well as on principle, that the prisoner has a right to show in this proceeding that the court, or magistrate acting as a court, who tried and sentenced him, had no jurisdiction. It is sufficient to cite *The People v. McLeod* (1 *Hill*, 669, and notes).

If, then, the two justices, who undertook alone and without a third, as a Court of Special Sessions, to try and sentence and commit the prisoner, could not and did not legally constitute a Court of Special Sessions, and had no power to try, convict or commit him, he must be discharged.

Whether the two justices did or could constitute such court, and had such power, depends upon the construction of the eighth and ninth sections of the act of April 16th, 1858, entitled "An act to provide for the appointment of a clerk and deputy of the Court of Special Sessions, in the city and county of New York, and in relation to the justices of said court."

By the eighth section, "the said Court of Special Sessions may be held by any three of the said police justices, who shall sit alternately, except that one of their number may be selected to preside. And the said justices shall meet in convention and assign justices to hold the several terms of said court." By the ninth section, all acts and parts of acts inconsistent therewith, are repealed.

By the forty-eighth section of act of April 14th, 1857, amending the city charter, Courts of Special Sessions in the city of New York *may* be held by any *two* police justices of said city, and it is thereby declared that when so held, all the powers and jurisdiction appertaining by law to such court,

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shall be possessed and exercised by the officers holding the same.

The question is, was the provision in the act of 1857 repealed by the act of 1858?

It is almost too plain for argument that the word *may* in both statutes means shall. It is hardly necessary to resort to the general provision of the Revised Statutes, vol. 3, 5th ed., 869, § 29, to show this. Statutes conferring criminal jurisdiction should be construed strictly. Not less than three justices can hold the court under the act of 1858. It would certainly be extraordinary if we had two statutes on our statute books in force, the one authorizing Courts of Special Sessions in the city of New York to be held by two, and the other by three police justices.

I think the provision in the act of 1857 plainly inconsistent with the act of 1858, and was intended to be and was repealed by it, and, therefore, the prisoner must be discharged.

NEW YORK GENERAL SESSIONS. June, 1860. *A. D. Russell*,
City Judge, presiding.

THE PEOPLE v. CHARLES VAN KEUREN, impleaded with
FRANKLIN WALTERS.

Form of a plea of *autrefois acquit*.

Where a defendant had had in his possession, at the same time, several counterfeit bank notes purporting to have been issued by different banks, and had been tried for having had one of such counterfeit notes in his possession with intent to utter it, and had been acquitted, such acquittal was held to be a bar to a conviction, on a subsequent trial, on another indictment, for having had the others of such counterfeit bank notes in his possession with intent to utter them.

On a plea of *autrefois acquit*, interposed in such a case, to which the district attorney demurred, judgment was given, on the demurrer, for the defendant.

The People v. Van Keuren.

On the seventeenth day of May, 1860, the defendant, Van Keuren, was tried in the New York General Sessions, on an indictment, charging him, in conjunction with one Walters, with having in his possession, in the city of New York, with intent to pass, a one dollar bill of the bank of Norfolk, Connecticut. On the trial, it appeared that, on Sunday, the 25th of March, 1860, Van Keuren, in company with Walters, entered a lager bier saloon, kept by one George Zuckschwerdt, at No. 305 Stanton street, in said city; that Walters called for drinks, of which both partook, and paid for them with a counterfeit one dollar bank bill, Walters receiving the change. Walters and Van Keuren then left. Mr. Zuckschwerdt immediately discovered that the bill was bad, and called a policeman who pursued Walters and Van Keuren, and arrested them. Van Keuren took from his pocket a large number of counterfeit bank bills, and was in the act of throwing them away, when the policeman wrested them from his hand. The bill set forth in the indictment was one of these. This was shown to be counterfeit, and given in evidence. The other bills were also proved to be counterfeit, and introduced in evidence for the purpose of proving guilty knowledge. The defendant, Van Keuren, however, was acquitted. He had been indicted, also, with Walters in other indictments, upon several of the other counterfeit bills. After his acquittal, the district attorney moved the trial of one of the other indictments. Defendants' counsel thereupon interposed the following plea of former acquittal.

NEW YORK GENERAL SESSIONS.

Charles Van Keuren, impleaded with Franklin Walters, <i>ads.</i> The People.

And the said Charles Van Keuren, in his own proper person, cometh into court here, and having heard the said indictment read, by leave of the court, saith, that the said People of the State of New York, ought not further to prosecute the said indictment against him, the said Charles Van Keuren

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because he saith, that he, the said Charles Van Keuren, by the name and description of Charles Van Keuren, heretofore, to wit: At a Court of General Sessions of the Peace, in and for the city and county of New York, holden at the City Hall, in and for the city and county of New York, of the term of April, to wit: on the 27th day of April, 1860, it was by the jurors of the People of the State of New York, in and for the body of the city and county of New York, upon their oaths presented, "That Charles Van Keuren, late of the first ward of the city of New York, in the county of New York, aforesaid, and Franklin Walters, late of the same place, on the 25th day of March, in the year of our Lord one thousand eight hundred and sixty, with force and arms, at the ward, city and county aforesaid, feloniously had in their possession a certain forged and counterfeited negotiable promissory note, for the payment of money, commonly called a bank note, purporting to have been issued by a certain corporation or company, called the Norfolk Bank, duly authorized for that purpose, by the laws of the State of Connecticut, which said last mentioned forged and counterfeited negotiable promissory note, for the payment of money, is as follows, that is to say :

"One.	No. 7530.	A	I.
THE NORFOLK BANK,			
CONNECTICUT.			
<i>Will pay one dollar to the Bearer, on demand.</i>			
NORFOLK, June 25th, 1858.			
J. A. FLEMING,		E. T. BUTLER,	
One.	Cash.	Pres't."	

With intention to utter and pass the same as true, and to permit, cause and procure the same to be so uttered and passed with the intent to injure and defraud divers persons to the jurors aforesaid unknown, they, the said Charles Van Keu-

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ren and Franklin Walters, then and there well knowing the said last mentioned forged and counterfeited promissory note, for the payment of money, to be forged and counterfeited as aforesaid, against the form of the statute in such case made and provided, and against the peace of the People of the State of New York and their dignity. Nelson J. Waterbury, district attorney." Which said last mentioned indictment is indorsed, "a true bill," and signed by Fulton Cutting, as foreman, and by Nelson J. Waterbury, as district attorney; and the said Charles Van Keuren, in his own proper person, further saith, that at a Court of General Sessions of the peace, in and for the city and county of New York, holden at the City Hall, in and for the city and county of New York, of the term of May, to wit: on the 17th day of May, 1860, before the Hon. A. D. Russell, city judge, he, the said Charles Van Keuren, was charged in the above last recited indictment for forgery, and his plea to the same being demanded, he, the said Charles Van Keuren, pleaded thereto "not guilty," and, on motion of Nelson J. Waterbury, Esq., district attorney for the city and county of New York, the said court ordered on the trial of the said Charles Van Keuren on said indictment for forgery.

Whereupon, the sheriff having returned a panel, the following persons appeared and were sworn, viz.: Charles B. Hayes, Nicholas N. Romain, Edwin R. Beach, Meyer L. Christeler, Henry G. Selick, Wilson Mettler, John H. Nichols, James Weir, James H. Crawford, William H. Bluhdom, Patrick M. Fallen, Charles Johnson. After hearing the testimony and a charge from the court, the jury retired to consider of their verdict, with Bartholemew Ward, the officer sworn to attend them, and after some time the said jury returned into court, and said they had agreed on the verdict, and by Charles B. Hayes, their foreman, said they found the said Van Keuren not guilty, in manner and form as he stood charged, and so said they all, as by the record thereof, more fully and at large appears; which said judgment still remains in full force and effect, and not in the least reversed or made void. And the

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said Charles Van Keuren, in fact, saith that the said Charles Van Keuren so indicted and acquitted as aforesaid, and he, the said Charles Van Keuren, who is charged in the present indictment first above mentioned and set forth, are one and the same person, and not other and different persons, and that the said offense of forgery, in the said former indictment mentioned last above set forth, and the said offense of forgery in this present indictment first above mentioned, are one and the same offense of forgery, and not divers and different offenses of forgeries; and that the said bank note, in the said former indictment last above mentioned and set forth, and the said bank note in the present indictment first above mentioned and set forth, were held by him, the said Charles Van Keuren, at the same time and place, and under the same circumstances, and with the same want of any guilty knowledge of him, the said Charles Van Keuren, of the same being forged or counterfeited; and with the same innocence of any intention of him, the said Charles Van Keuren, to utter or pass the same as true, or to permit, cause or procure the same to be so uttered or passed, with intent to injure or defraud any person or persons; and that they were in the same parcel, and they were finally taken from his possession on the same occasion and under the same circumstances; and the same were not held by him at any other or different times or places, nor under any other or different circumstances, nor with any knowledge of the same being forged or counterfeited, nor with any other or different intent; and the same were not in any other or different parcel, and were not taken from his possession upon any other or different occasions, nor under any other or different circumstances; and this he is ready to verify. Wherefore, since he, the said Charles Van Keuren, hath already been heretofore acquitted of the offense of forgery aforesaid, he prays judgment, and that by the court he may be dismissed and discharged from the said premises, in the present indictment specified.

HENRY L. CLINTON,
Of counsel for defendant Van Keuren.

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To this plea the district attorney interposed a demurrer. The prisoner joined in demurrer.

Henry L. Clinton, for the prisoner.

The plea of former acquittal, on the facts set forth, is clearly good. The evidence to sustain this indictment was admissible to prove guilty knowledge on the former trial. All the bills found in the possession of the prisoner, at one and the same time, could be given in evidence, on an indictment setting forth any of such bills. With the exception of positive admission of guilty knowledge, the introduction in evidence of other bills than those set forth in the indictment, is usually the principal mode of establishing the *scienter*.

If the material question involved in this might have been the subject of testimony, and might have been passed upon by the jury, on the trial of the former indictment, the defense interposed by the plea of former acquittal is impregnable.

The books are full of cases illustrating this principle. Thus in the case of *The People v. Allen* (1 *Park. Cr. R.*, 445), it was held on the trial of an indictment, charging the defendant with having uttered and published, as true, a promissory note made by the defendant, on which the names of certain individuals appearing as indorsers were alleged to have been forged, it was a good defense, under the plea of *autrefois acquit*, that the defendant had before been indicted and tried for the offense of forging and counterfeiting the same indorsements, and in such previous trial had been acquitted by the verdict of a jury upon the merits, the only controverted question on both trials being whether such indorsements were genuine.

In the case of *The People v. McGowan* (17 *Wend. R.*, 386), it was held that a trial and acquittal for robbery was a bar to an indictment for larceny, where the property alleged to have been taken is the same. COWEN, J., in delivering the opinion of the court, observes: "In such cases it is well settled that where the former indictment might have been sustained by showing the offense charged in the second, a *prima facie* case

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is made out for the prisoner. It then lies with the people to show by evidence *aliunde* that the offenses are substantially different in point of fact or to give some other answer."

In *The People v. Taylor* (8 Denio R., 95), BRONSON, J., upon the subject of what is necessary to be proved on the trial of the plea of former acquittal, observes: "An averment of identity is always necessary both in civil and in criminal cases, where a former trial is pleaded in bar, and when properly pleaded it is enough to show by the record that the pleadings were such in the first case, that the same matter *might have come directly in question on the trial*; and then to show by extrinsic evidence that it did in fact so come in question on the trial." In *State v. Commissioners of Fayetville* (2 Murphy R., 871), it was held that where defendants were bound to keep the streets of an incorporated town in order, and three or four streets are presented on the same day, the defendants should be indicted but once for all; if separate bills be found, on a conviction on one, it might be pleaded in bar to the others.

TAYLOR, Ch. J., in delivering the opinion of the court, holds the following language: "The defendants are bound to keep all the streets of the town in repair, and are liable to an indictment upon every neglect of this duty. But if more than one street is out of repair at the same time this does not multiply the offenses, though the one committed must take its nature and degree from the greater or less negligence with which it is attended. It would be monstrous to charge them with separate indictments for every street in the town, when the whole were out of repair at the same time, especially when upon one indictment a fine can be imposed, adequate to the real estimate of the offense. Were such a doctrine tolerated it is impossible to say where its consequences would end; for then an overseer, whose road is out of repair, might be charged in separate indictments for every hundred yards (why not every yard?), and be ruined by the costs, when perhaps a moderate fine would atone for the offense. This notion of rendering crimes, like matter, infinitely divisible, is repugnant to the spirit and policy of the law, and ought not to be countenanced.

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It is the opinion of the court that the plea of *autrefois convict*, relied on by the defendant, is a bar to all the other indictments.

In *State v. Cooper* (1 *Green R.*, 361), it was held that a conviction, upon an indictment for arson, is a good plea in bar to an indictment for murder caused by the burning of the same house.

DRAKE, J., in delivering the opinion of the court in this case observes: "It is also a maxim of the common law, that 'no man is to be brought into jeopardy of his life more than once for the same offense.' The constitution of New Jersey adapts and declares this important principle in this form: 'Nor shall any person be subject for the same offense to be twice put in jeopardy of life and limb.' Our courts of justice would have recognized it, and acted upon it as one of the most valuable principles of the common law, without any constitutional provision. But the framers of our constitution have thought it worthy of especial notice, and all who are conversant with courts of justice, and the proceedings in them, must be satisfied that this great principle forms one of the strong bulwarks of liberty; and that if it be prostrated, every citizen would become liable, if guilty of an offense, to the unnecessary costs and vexation of repeated prosecutions, and if innocent, not only to those, but to the danger of an erroneous conviction from repeated trials." * * * * * "If in civil cases the law abhors a multiplicity of suits, it is yet more watchful in criminal cases, that the crown shall not oppress the subject, or the government the citizen, by unnecessary prosecutions."

In the case of *State v. Benham* (7 *Conn. R.*, 414), it was held that having in one's possession several forged bank notes of different banks at one time, with intent to pass them, and thereby to defraud the person who shall take them, constitute but one offense. And if there be several informations charging that the several bills so held in possession were held with intent to defraud the several banks by which they were issued, as well as the person who should take them, there is still but one offense charged.

The following is the reporter's statement of the case:

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This was an information charging the prisoner, Amos Benham, with having in his possession, on the 26th of December, 1828, a forged note or bill of the Troy Bank, with intention to utter and pass the same, and with intention to defraud the said Bank of Troy, and also him or them to whom he should utter or pass the same, knowing it to be forged. To this information the prisoner pleaded a former information filed against him at the same time, for having in his possession a bank note of the Mechanics' Bank of the city of New York, with intent to utter and pass the same, and with intent to defraud the said Mechanics' Bank, and also him or them to whom he should pass the same; upon which last information the plea averred trial had been had and the prisoner found *guilty*, and judgment thereon impends. The plea also averred that the offense charged in the information, upon which the prisoner had been convicted, is the same offense wherewith he is charged in the present information, and that the said bank note specified in that information was held by the prisoner on the said 26th day of December, 1828, at the same time and place, and with the same intent, and with the same knowledge of its being forged, and that it was in the same parcel, and was, finally, taken at the same time from his possession, and was never at any different time in his possession. To this plea there was a demurrer. The court adjudged the plea sufficient. To review that decision the attorney for the State, by motion in error, brought the case before this court.

WILLIAMS, J., in delivering the opinion of the court, says: "The statute upon which this information is founded, enacts: That if any person shall have in possession, or receive from any other person, any forged or counterfeited promissory note or bill for the payment of money, with intention to pass or utter the same, or to permit, cause or procure the same to be uttered or passed, with intention to defraud any person or body politic or corporate, knowing the same to be forged or counterfeited, every such person so offending, being thereof duly convicted, shall suffer punishment, &c.

"The prisoner had in his possession at one time several bank

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notes or bills of different banks, which were taken from him at one time. He had been tried for having one of them in his possession, and convicted; and the question now is, whether he can be again tried and convicted for passing each of the other notes of the different banks which he had at that time. In other words, is the possession of each bill or note, holden at one and the same time, a distinct offense, and punishable as a distinct crime? * * * The number may add to the evidence of guilt, but not to the number of offenses. In an action for the penalty of insuring tickets in a lottery, where ten tickets were insured at one and the same time, Lord KENYON held that but one penalty could be recovered.

"This information might have specified each note which the prisoner had in his possession, as was done in several cases cited in *King v. Sutton Co. (Tem. Hardw., 372)*. Had that been done, it would hardly be claimed that there could have been several punishments. The offense, then, is one and the same offense."

From the report of this case it will be perceived that the statute of Connecticut is substantially similar to ours, and that the precise point relied upon here was there adjudged. The statutory provisions of New York applicable to the subject are as follows:

§ 36. "Every person who shall have in his possession any forged, altered or counterfeit negotiable note, bill, draft or other evidence of debt issued, or purporting to have been issued, by any corporation or company duly authorized for that purpose by the laws of the United States, or of this State, or of any State, government or country, the forgery of which is hereinbefore declared to be punishable, knowing the same to be forged, altered or counterfeited, with intention to utter the same as true or as false, or to cause the same to be so uttered, with intent to injure or defraud, shall, upon conviction, be subject to the punishment herein prescribed for forgery in the second degree." (2 R. S., 674.)

§ 42. "Persons convicted of the different degrees of forgery herein specified shall be punished as follows:

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1. Those convicted of forgery in the first degree, by imprisonment in a State prison for a term not less than ten years.

2. Those in the second degree, by a like imprisonment not more than ten and not less than five years." (*Ib.*)

Thus it will be seen that, if the defendant is liable to a conviction on each of the fifteen counterfeit bank bills, taken from his possession at the same time, and under the same circumstances, he might be sentenced to imprisonment in the State prison for one hundred and fifty years! The law is chargeable with no such cruelty.

J. H. Anthon, for the People, contended that the plea was bad; that the offenses set forth in the former and present indictments were entirely distinct and different, and that the case of *The People v. Benham* (7 Conn. R., 414) was distinguishable from the case at bar, inasmuch as there was a conviction in the former case and an acquittal in the latter case.

By the Court. The defendant had in his possession at one time several bank notes or bills of different banks, which were taken from him at the same time. He has been tried for having one of them in his possession and acquitted, and the question arises whether he can be again tried for possessing each of the other notes of the different banks which he had at that time. Is the possession of each bill or note, holden at one and the same time, a distinct offense, and punishable as a distinct crime? I cannot perceive how they could be deemed distinct offenses. Had the defendant uttered or paid away all of the bills found in his possession to one person at the same time, it cannot be claimed that he could be convicted of more than one offense; and yet it is claimed that, having them in his possession, although he never offered to utter them, he may be punished for more than one offense. The act of possessing several notes, found in defendant's possession at the time of his arrest, must be considered as one and the same offense, as much as the act of stealing a number of articles at the same time and place. (*State v. Benham*, 7 Conn. R., 417.) This case was decided by the Supreme Court of Errors, in

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Connecticut, in a case similar to the one in question, except that in that case the verdict of the jury was that of guilty. A distinction between the two cases was urged by the district attorney on that ground, but I cannot perceive that there is any difference. The pleas of *autrefois acquit* and *autrefois convict* rest upon the same legal principles. The same law applicable to the one is applicable to the other. (*Whar. Am. Cr. Law*, 540.) Judgment must, therefore, be rendered in favor of the defendant and against the People on the demurrer.

SUPREME COURT. Cayuga Special Term, January, 1860. Before
Knox, Justice.

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The question of a prisoner's guilt or innocence of a crime for which he is indicted, can in no case be decided on an application for a discharge on *habeas corpus*.

The presumption of innocence to which a prisoner is entitled on a trial before a jury, is not applicable to proceedings on *habeas corpus*.

To subject a prisoner to a second trial, where a former conviction on the indictment has been reversed, and a new trial ordered, by a court of review, on the application of the prisoner, is not a violation of the constitutional provision which declares that "no person shall be subject to be twice put in jeopardy for the same offense."

The provisions of the Revised Statutes, under which a prisoner is declared to be entitled to his discharge if not brought to trial before the end of the next term of the court, unless satisfactory cause be shown by the district attorney (3 R. S., 561 ed., 1029, 1030), are not a "statute of limitations;" a failure to comply with them would be a mere irregularity, and would not entitle a prisoner to be discharged on a writ of *habeas corpus*.

Nor is it a sufficient cause for discharge on *habeas corpus* that the prisoner was not present in court when the trial of the indictment was postponed till the next term of the court, though it was the right of the prisoner to be present.

THE prisoner was brought up on a writ of *habeas corpus*, and the grounds on which he claimed to be discharged are sufficiently stated in the opinion of the court.

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E. H. Ruloff, in person.

D. Wright, for sheriff.

KNOX, J. The question to be decided arises upon a writ of *habeas corpus*, issued to the sheriff of the county of Cayuga, to inquire into the cause of the detention by him of Edward H. Ruloff, the relator, the return of the sheriff to such writ, the allegations and proofs of the prisoner, and the allegations and proofs offered by the district attorney of the county of Tompkins. From these the following facts appear:

That on the 18th day of December, 1845, the prisoner was indicted at a Court of Oyer and Terminer, of the county of Tompkins, for the murder of Harriet Ruloff, in the county of Tompkins, on the 24th day of November, 1845. That in the month of September, 1847, the prisoner was arraigned on these indictments, and pleaded that in the month of February, 1846, he had been convicted of a Court of Oyer and Terminer, held in the county of Tompkins (HIRAM GRAY, justice), of having abducted her or taken the said Harriet Ruloff out of the country, and against her will, which conviction still remains in full force and virtue. That upon the trial for abduction the jury were charged among other things, in substance: "That if they should find that at the time of her disappearance, the said Harriet had in fact been murdered in the county, then they should acquit the prisoner of abduction, and that to convict of abduction, they should find that at the time of her disappearance, she had in fact been taken out of the county alive, and against her will."

That in June, 1856, at a Court of Sessions in Tompkins, the prisoner was indicted for the murder of his infant daughter, upon which, at the Tioga Circuit, held in October, 1856, the said indictment having been removed into the Supreme Court for trial, the said Ruloff was found guilty. That a writ of error with stay of proceedings, having been afterward allowed, the Court of Appeals reversed the judgment, and ordered a new trial, and remitted the case for further proceedings. That in July, 1859, the prisoner sued out a writ of

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habeas corpus, and on being taken before the general term of the Supreme Court, at Cooperstown, the case was set down for trial at the October term, of the Tioga Circuit, 1859. That at the Tioga Circuit an order was entered by direction of the presiding justice, on motion of the district attorney, without any appearance of said Ruloff, but in his absence and without his consent or knowledge, continuing the said indictment to the next term of the Circuit Court, to be held in the county of Tioga. That since the filing of the *remittitur*, the district attorney has allowed the May general term, of the Supreme Court, in and for the 6th district, several circuits and special terms of said court, and the spring term of the Tioga Circuit to pass, keeping the prisoner in custody upon this charge, without moving for a new trial or bringing the prisoner into court, or making any other motion in the case, except the motion made as aforesaid, to continue said indictment in the Tioga Circuit, in October, 1859.

That an indictment was found against the prisoner, at the Court of Sessions of Tompkins county, in July, 1859, for breaking jail on the 5th day of May, 1857. That a warrant was issued on said indictment, and delivered to Edward P. Hoskins in July, 1859, on which the prisoner was arrested in July, 1859, and having been confined in the jail of Tompkins county, was transferred to the jail of the county of Cayuga, by an order of the county judge of the county of Tompkins, on the ground that the jail of the county of Tompkins was unsafe for his confinement.

On these facts, the prisoner asks to be discharged, and rests his demand on these grounds:

1st. As to the murder of Harriet Ruloff. The conviction for abduction, and the indictment for the murder of Harriet Ruloff, being both for the same substantial matter, though charged as different offenses, the conviction for abduction, while unreversed, is an absolute bar to the prosecution for murder.

2d. The failure to bring the prisoner to trial within the time prescribed by the statute, entitles the prisoner to be discharged. That by the statute he acquires this right, which no subsequent

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proceedings can divest him of, and that, so far as relates to the offense charged, he is ever after entitled to a discharge.

3d. That as to the murder of his infant daughter, the prisoner has been once tried, within the intent and meaning of the Constitution, and is therefore entitled to his discharge.

4th. That the order made in his absence, at the Tioga Circuit, was and is void, as without jurisdiction, and so he is entitled to his discharge, for the reasons stated in the second point.

5th. That as to the charge of breaking jail, the neglect of the district attorney to bring him to trial at either of the subsequent terms of the Tompkins Sessions, or show cause for delay, entitles him to a discharge.

The importance of this case to the prisoner, and the great interest manifested by the public in regard to it, rather than any difficulty in arriving at what I deem a proper conclusion, have led me fully to state the causes of the detention of Ruloff, and his allegations and my reasons at length, for a decision which otherwise would have been made at the close of the hearing.

It would, perhaps, be a sufficient answer to the application for his discharge, to say, that, admitting all he claims, to wit: that under these proceedings we have a right to try the question of a prisoner's guilt or innocence, though charged on indictment, and that he is innocent of the charges alleged against him and should be discharged, after the district attorney has suffered two sessions of the court in which the indictments are triable, to pass without bringing him to trial, or showing cause for continuing the indictments, there is no evidence before me, that since his arrest and confinement on the indictment for breaking jail, any terms of the Court of Sessions in the county of Tompkins, at which he could have been tried, have been held. There is no evidence, therefore, on which to found the allegation that he has a right to be discharged, which has become absolute and which cannot be divested. But I shall put my refusal to discharge him on no such narrow ground.

All the objections made by the prisoner rest upon funda-

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mental errors. He mistakes and misstates the office of a writ of "*habeas corpus*." He assumes that the officer granting it has a right to try the question whether a prisoner indicted is "guilty or not guilty" of the crime of which he is charged. This is not the case. The history of the writ, the nature of it, and the practice under it, both as a common law remedy and as extended and modified by statute in England and in this country, show that it never was contemplated that such a trial was to be had. The only way in which this question can be tried, is by the intervention of a jury before a proper court; and in a capital case it has been but recently held by the Court of Appeals, that the person charged cannot be tried, even by his own consent, except by a jury of twelve men. (*Canceri, plaintiff in error, v. The People, defendants in error*, 18 N. Y., 129.) The writ issues to inquire into the grounds upon which any person is restrained of his liberty, and when it is found that his restraint is illegal, he is to be delivered. It certainly cannot be said that a person's restraint is illegal when he is held upon two indictments for felonies of the first class, and upon one indictment for a misdemeanor, on each of which, in a proceeding of this nature, he is supposed to be guilty of the offenses with which he is charged, though on a trial by a jury his entire innocence will be presumed. In the case of *McLeod* (1 *Hill*, 377), Justice COWEN held, and such was the opinion of the late Nicholas Hill (see note in third vol. of *Hill*, 658), that the fiftieth section of the *habeas corpus* act is satisfied by limiting the inquiry to the lawfulness of the authority under which the prisoner is detained without being extended to the force of the evidence upon which the authority was exerted, on which it may be in the prisoner's power to adduce at the trial. Though able judges since have dissented from this proposition, and held that the Supreme Court, in the exercise of its appellate jurisdiction in criminal matters, or any member of it, when the commitment was by an examining magistrate before trial, may not only review the ground of commitment upon which the magistrate has acted, but hear new proof, and bail or remand the prisoner, as the

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justice of the case may require; no one has decided that a party duly committed on a regular indictment, can be discharged on *habeas corpus* by proving his innocence, however clear the proof may be. The question was asked on the hearing: "Suppose a person is indicted for the murder of A. B., and committed, and subsequently A. B. is produced alive, may not that person, on *habeas corpus*, on producing A. B. alive before the officer, be acquitted and discharged of the offense as on a trial?" I answer, *no*. A trial in court and an acquittal by a jury, or the entering of a *nolle prosequi* by the district attorney, by order of the court in which the indictment is pending, are the only methods by which the prisoner can be fully discharged.

It is not necessary to say whether in the case supposed the officer might not properly let to bail. If, in a given case, it appeared by the indictment, that no offense was charged, that is to say, if the act charged as having been committed by the prisoner constituted no offense, as if, for instance, the prisoner was held on an indictment which charged "that he had absented himself from the State, and he was guilty of a mis demeanor," there would be nothing to try, and the prisoner might be discharged. But when there is an offense charged a jury must come. If the officer issuing the writ, can try the question which the prisoner asks him to try, and decide it in his favor and acquit, why may not the officer decide it against him and punish. If he can say he is not guilty, why may he not say he is guilty. This inevitably follows from the right to try, and then how would the officer execute his judgment? It would be a novel proceeding were an officer authorized to try and acquit, but not to convict. Such an officer would soon, I apprehend, monopolize all the criminal business of the country, especially when the persons tried were really guilty.

I have said enough, and perhaps too much, on this point.

Now, as for the point that he cannot be twice tried for the same offense. I say, the conviction for the murder of his infant daughter having been reversed and a new trial ordered,

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matters stand as if there never had been any trial on the indictment. In fact, in the eye of the law, he has not yet been tried. Errors were committed on the trial which made it necessary to set aside the conviction, and it is a little strange, if the objection is tenable, that the counsel of the prisoner did not suggest to the Court of Appeals the propriety of discharging the prisoner, in case they found that the conviction should be set aside, on the ground that the "*corpus delicti*" had not been proved.

As to the right to be discharged because of the delay in bringing the prisoner to trial, let us see what the statute says: "If any prisoner indicted for any offense, triable in a Court of Sessions, and committed to prison, whose trial shall not have been postponed at his instance, shall not be brought to trial before the end of the next term of the Court of Sessions which shall be held in the county in which he is imprisoned after such indictment found, he shall be entitled to be discharged so far as relates to the offense for which he is committed."

"If any prisoner, indicted for any offense not triable in a Court of Sessions, but which may be tried in a Court of Oyer and Terminer and committed to prison, whose trial shall not have been postponed at his instance, shall not be brought to trial before the end of the next Court of Oyer and Terminer which shall be held in the county in which he is imprisoned, after such indictment found, he shall be entitled to be discharged, so far as relates to the offense for which he was committed."

"If satisfactory cause shall be shown by the district attorney, to any court to which application should be made, under either of the two last sections, for detaining such prisoner in custody or upon bail, until the sitting of the next court in which he may be tried, the court shall remand such prisoner, or shall hold him to bail, as the case may require." (3 R. S., 5th ed., pp. 1029, 1030, §§ 80, 81, 82.)

These sections are not a "statute of limitations." They are intended to regulate the practice of the courts, and a failure to

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comply with them would be a mere irregularity. But, as a matter of fact in this case, after the prisoner had, by writ of *habeas corpus*, been brought before the Supreme Court in the sixth district, a new trial in the case of the indictment for the murder of his infant daughter was ordered, while the prisoner was present, to be had at the next Tioga Circuit. At this circuit, the indictment was continued till the next circuit to be held in Tioga. When this order was made, the prisoner was not present. Although he ought, properly, to have been present, and had a right to be, the order continuing the indictment without his presence, was a mere irregularity, and it is well established that a mere irregularity cannot be reached by *habeas corpus*.

The prisoner asks, "How then am I ever to be discharged, if the district attorney will not move my trial; and the courts will not discharge me as the statute provides, or on a writ of *habeas corpus*?" To this it may be said, that it is not to be supposed that courts, judges, or other officers, will not do their duty, but the contrary. The statute provides that, previously to every court, the district attorney shall issue his precept, commanding the sheriff to bring all his prisoners before the court, with all papers and process relating to each, which precept the sheriff must obey (2 R. S., § 509, sec. 28, 4th ed.); and then, unless satisfactory cause be shown for detaining him, he may be discharged.

I hold, therefore, that the prisoner must be remanded, and be discharged after trial and acquittal, or by the entering of a *nolle prosequi* by the district attorney, or by order of the court under the sections of the statute already quoted.

SUPREME COURT. Kings General Term, February, 1860. *Lott, Brown and Emott*, Justices.

PETER J. DEMPSEY, plaintiff in error, *v.* THE PEOPLE, defendants in error.

Under chapter 110 of the Session Laws of 1853, the magistrates and courts of Kings county are required to send to the penitentiary instead of the county jail, all persons convicted before them, who shall be sentenced to imprisonment for thirty days or more.

Whether a prisoner, in confinement, in pursuance of a final judgment, can be admitted to bail, after an allowance of a writ of error, when there is no direction therein that the same shall operate as a stay of proceedings, doubted by *Lott, J.*

PETER J. DEMPSEY pleaded guilty, in the Court of Sessions of Kings county, to an indictment for assault and battery, and was thereupon sentenced to imprisonment for six months in the penitentiary of said county.

A writ of error was sued out, and the case removed to the Supreme Court, on the claim that there was no authority to imprison in the penitentiary, under ch. 110 of the Laws of 1853.

An application was made to Mr. Justice *LOTT* to let the prisoner to bail, pending the writ of error. The application was denied, and the following opinion given.

LOTT, J. It is immaterial, in the view taken by me of the question presented as the ground of error in the judgment of the Court of Sessions, whether the liability of the plaintiff in error to confinement in the penitentiary depended on the term of imprisonment prescribed by law, on his conviction of the offense with which he was charged, or the time fixed by his sentence. He was, in fact, sentenced for six months, but the court was authorized to imprison for a year. He was in either case, therefore, in the language of the act relating to the penitentiary (*ch. 110 of the Laws of 1853*), liable to imprisonment for a period of not less than thirty days, and being so liable it was made the duty of the court, by that act, to sentence him, as they did, to confinement in the penitentiary instead of the

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county jail. That judgment is, as I understand, in conformity with the construction given to that act since it took effect, and in accordance with the opinion expressed in the case of *The People v. Cavanagh* (1 Park. Cr. R., 592), and after a careful examination, I do not find sufficient to justify the conclusion that there is any reasonable doubt of the legality of the sentence. Entertaining this view of the case, I cannot admit the prisoner to bail.

It may be proper to add that, if I entertained any doubt on the question presented, it is at least questionable whether a prisoner in confinement, in pursuance of a final judgment and sentence, can be admitted to bail, after an allowance of a writ of error (which is in this case a writ of right, and issues of course without reference to the merits), when there is no direction therein that the same shall operate as a stay of proceedings.

The cause then came on to argument on the return to the writ of error.

James Troy, for the plaintiff in error.

The act of the legislature of April 5, 1853, does not authorize the commitment to the penitentiary of any persons except those "who, on conviction, are liable to imprisonment for a period of not less than thirty days."

This refers not to the *sentence*, but to the *statutory limit* of punishment of an offense.

The term of imprisonment for an assault and battery is limited by statute. It cannot exceed one year; it may be less than thirty days (2 R. S., 697.) For that offense a person is liable to imprisonment for less than thirty days, and that offense is not, therefore, one for which a person convicted may be sent to the penitentiary.

John Winslow (District Attorney), for the defendants in error.

1. The liability meant by statute is the liability on the *sentence*, and the prisoner being sentenced for more than thirty days, to wit, for six months, was properly sent to the peniten-

tiary. (*The People v. Cavanagh*, 1 *Park. Cr. R.*, 588; 2 *Id.*, 850.)

2. The construction of the statute sought by the plaintiff in error, would clearly nullify its obvious purpose and make it an absurdity.

(a.) The object of the statute clearly is to have all persons sentenced for a term of thirty days and upwards (except such as are sentenced to State prison), imprisoned in the penitentiary, and not in the county jail; or, to use the language of the statute, "*instead of the county jail.*"

(b.) The absurdity of the construction sought by the plaintiff in error is quite obvious. For example: "The statute punishes sodomy by imprisonment in the State prison for a term not exceeding ten years. It is left to the court to say how much less it shall be. It may be less than thirty days, and, therefore, the plaintiff would say, adhering to his construction, that all persons convicted of said felony, being liable on conviction to imprisonment for a term less than thirty days, *must* be sent to the county jail. This would be true of many other felonies. As a practical result, therefore, the construction of the statute claimed by the plaintiff would throw wide open the doors of the State prison and the penitentiary.

(c.) It is said, in *Behan v. The People* (17 *N. Y. R.*, 521), that "courts, in construing a statute, will look at the general scope and purpose of the act, and search there for an expression of the legislative intention."

The judgment of the Court of Sessions was affirmed.

SUPREME COURT. New York General Term, December, 1860.
Clerke, Sutherland and Barnard, Justices.

HONEYWELL VINCENT, plaintiff in error, v. THE PEOPLE,
defendants in error.

Form of an indictment for forgery in the first degree, charged to have been committed after a previous conviction for a felony.

In an indictment for forging a certificate of acknowledgment of a mortgage, it is necessary to allege that the officer, whose act it purports to be, was duly authorized to make such certificate; and the omission to make such allegation is not supplied by setting forth the certificate *in hæc verba*, if the venue or name of the county is omitted in the certificate, it appearing by the signature that the certificate purported to have been made by a commissioner of deeds. When the authority of the officer depends on locality, it must appear that he acted within the territorial limit prescribed by the statute; and if this does not appear upon the face of the certificate, its being set forth in the indictment will not supply the omission of a general allegation of authority.

THIS case came up on writ of error to the New York General Sessions. By the return, it appeared that in June, 1860, the following indictment was found against the plaintiff in error in that court:

City and County of New York, ss:

The jurors of the People of the State of New York, in and for the body of the city and county of New York, upon their oath present, that heretofore, to wit, at a Court of General Sessions of the Peace, holden in the city of New York, in and for the city and county of New York, on the 10th day of July, in the year of our Lord one thousand eight hundred and forty-eight, before the Honorable JOHN B. SCOTT, recorder of the city of New York, and THOMAS K. DOWNING and DENNIS CAROLIN, Esqrs., aldermen of the said city, justices of the said court, assigned to keep the peace of the said city and county of New York, Honeywell Vincent, otherwise called Henry Vincent, was, in due form of law, tried and convicted of felony, to wit, of obtaining goods by false pretenses, upon a certain indictment then and there depending against the said

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Honeywell Vincent, otherwise called Henry Vincent, and Alexander G. Coxe, and Ephraim Maynard, for that the said Honeywell Vincent, otherwise called Henry Vincent, Alexander G. Coxe, and Ephraim Maynard, being persons of evil disposition, ill name and fame, and of dishonest conversation, and devising and intending, by unlawful ways and means, to obtain and get into their hands and possession the moneys, valuable things and effects of the honest and good people of the State of New York, to maintain their idle and profligate course of life, on the seventh day of March, in the year of our Lord one thousand eight hundred and forty-seven, at the second ward of the city of New York, in the county aforesaid, with intent feloniously to cheat and defraud Andrew J. Berrian and Archibald J. Brown, did then and there, feloniously, unlawfully, knowingly, and designedly, falsely pretend and represent to the said Andrew J. Berrian and Archibald J. Brown that a certain bond and mortgage, which they, the said Alexander G. Coxe, Honeywell Vincent, otherwise called Henry Vincent, and Ephraim Maynard, then and there exhibited and delivered to the said Andrew J. Berrian and Archibald J. Brown, were true instruments, made and executed by Ephraim Maynard to H. Vincent, for a full and valuable consideration; that said mortgage was upon eight lots of ground, situate and lying upon Louisa street, and two lots of ground upon Columbia street, in the city of Utica, located upon points designated upon a certain map which the said Coxe, Vincent, and Maynard, then and there exhibited to the said Andrew J. Berrian and Archibald J. Brown, and that said property was worth twelve hundred dollars over and above the amount of the said mortgage, and that said property was owned by the said Ephraim Maynard, and that the said Alexander G. Coxe was the agent of the said Vincent; and the said Andrew J. Berrian and Archibald J. Brown, then and there, believing the said false pretenses and representations so made, as aforesaid, by the said Alexander G. Coxe, Honeywell Vincent, otherwise called Henry Vincent, and Ephraim Maynard, and being deceived thereby, were induced, by reason of the false

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pretenses and representations so made, as aforesaid, to deliver, and did then and there deliver to the said Coxe, Vincent, and Maynard, three hundred gold pens, and three hundred pencils, of the value of seven hundred and fifty dollars, of the proper moneys, valuable things, goods, chattels, personal property, and effects of the said Andrew J. Berrian and Archibald J. Brown, and the said Coxe, Vincent, and Maynard did then and there designedly receive and obtain the said goods and merchandise, of the said Andrew J. Berrian and Archibald J. Brown, of the proper moneys, valuable things, goods, chattels, personal property, and the effects of the said Berrian and Brown, by means of the false pretenses and representations aforesaid, and with intent, feloniously, to cheat and defraud the said Berrian and Brown of the said goods and merchandise. Whereas, in truth, and in fact, the said bond and mortgage were utterly false and fictitious instruments; that the said Maynard did not own any such property in the city of Utica, and the said bond and mortgage were not made and executed for a full and valuable consideration, or any consideration whatever; and, whereas, in truth, and in fact, the said Alexander G. Coxe was not the agent of said Vincent; and, whereas, the said bond and mortgage were, and are, in all respects, utterly worthless, false, and fictitious; and, whereas, in fact, and in truth, the pretenses and representations so made, as aforesaid, by the said Alexander G. Coxe, Honeywell Vincent, otherwise called Henry Vincent, and Ephraim Maynard, to the said Andrew J. Berrian and Archibald J. Brown, was, and were, in all respects, utterly false and untrue, to wit: on the day and year last aforesaid, at the ward, city, and county aforesaid; and, whereas, in truth, and in fact, the said Coxe, Vincent, and Maynard, well knew the said pretenses and representations, so by them made, as aforesaid, to the said Berrian and Brown, to be utterly false and untrue, at the time of making the same, against the form of the statute in such case made and provided, and against the peace of the People of the State of New York and their dignity.

And, therefore, it was considered by the said court there,

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that the said Honeywell Vincent, otherwise called Henry Vincent, should be imprisoned in the State prison, at Sing Sing, for the term of two years, as by the record thereof doth more fully appear.

And the jurors aforesaid, now here sworn, upon their oath, aforesaid, do further present, that the said Honeywell Vincent, otherwise called Henry Vincent, having been so convicted of felony, to wit, of obtaining goods by means of false pretenses, and having been duly discharged and remitted of such judgment and conviction, afterward, to wit, on the first day of May, in the year of our Lord one thousand eight hundred and sixty, at the first ward of the city of New York, in the county of New York, aforesaid, with force and arms, feloniously did forge and counterfeit, and falsely alter, and cause and procure to be forged and counterfeited, and falsely altered, and willingly act and assist in the forging and counterfeiting and falsely altering, a certain instrument and writing, *commonly called a certificate*, the same being a certificate of the acknowledgment, by one Sarah J. Lyon, of a certain mortgage, the said mortgage being an instrument which, by law, might be recorded, which said false, forged, and counterfeited certificate is in the words and figures following, that is to say:

"State of New York, — County, ss:

On the first day of May, in the year one thousand eight hundred and sixty, before me, the subscriber, appeared Sarah J. Lyon, to me personally known to be the same person described in, and who executed the within instrument, and acknowledged that she executed the same.

ABRM. W. KENNEDY, *Commissioner of Deeds.*"

Which said false, forged, and counterfeited certificate, was indorsed on the said mortgage, which is in the words and figures following, that is to say:

This indenture, made the first day of May, in the year one thousand eight hundred and sixty, between Sarah J. Lyon, of the city, county, and State of New York, of the first part, and H. Vincent, of said city, party of the second part, wit-

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nesseth: that the said party of the first part, in consideration of the sum of one thousand dollars, to her duly paid, hath sold, and by these presents doth grant and convey to the said party of the second part, all my right, title, and interest in and to a certain parcel or piece of land, lying, being, and situate in the city of New York, and located on the westerly side of the Seventh avenue, in the Twelfth ward of said city; the said property consisting of two lots of ground, measuring twenty-five feet front and rear, by one hundred feet each in depth, known and distinguished on a certain map, entitled a "map of Harlem Heights," and now on file in the hall of records, in said city, aforesaid, with the appurtenances, and all the estate, title, and interest of the said party of the first part therein. This grant is intended as a security for the payment of one thousand dollars, which payment, if duly made, will render this conveyance void.

In witness whereof, the said party of the first part hath hereunto set her hand and seal, the day and year first above written.

SARAH J. LYON. [L. s.]

Sealed and delivered in }
the presence of }

ABR'M W. KENNEDY.

With intent to injure and defraud one Edward R. Robinson, and divers other persons, to the jurors aforesaid unknown, against the form of the statute in such case made and provided, and against the peace of the People of the State of New York and their dignity.

N. J. WATERBURY, *District Attorney.*

On the trial the prisoner was found guilty of forgery in the first degree, and was sentenced accordingly.

Sidney H. Stuart, for the plaintiff in error.

This indictment is bad, and the verdict of the jury and judgment of the court ought to be reversed, because,

First. The indictment fails to describe the offense charged in the language of the statute, or to state all the circumstances constituting the statutory definition of the crime alleged. The

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statute describes the offense of which the prisoner was convicted, in the following words: "Whoever shall forge," &c., "any certificate or indorsement of the acknowledgment, by any person, of any deed or other instrument, which by law may be recorded, made, or purporting to have been made, by any officer duly authorized to make such certificate or indorsement, shall be guilty of," &c. (3 R. S., 5th ed., 949.)

The indictment describes the offense of which the prisoner was convicted, in the following words: "That the defendant feloniously did forge, &c., a certain instrument and writing, commonly called a certificate, the same being a certificate of the acknowledgment, by one Sarah J. Lyon, of a certain mortgage, the said mortgage being an instrument which, by law, might be recorded; which said false, forged and counterfeit certificate is in the words following," &c.

The fault of the indictment in this particular is the omission of the statutory words, "purporting to have been made by an officer duly authorized to make such certificate."

The omitted words are part of the statutory description of the offense, and their absence is fatal to the validity of the indictment. "A verdict does nothing more than verify the fact charged in the indictment." (*State v. Godfrey*, 24 Maine R., 232.)

"An indictment founded upon a statute must charge all the facts and circumstances which constitute the statute offense, so as to bring the accused perfectly within the statute." (*The People v. Allen*, 5 Denio R., 76.)

"Indictments upon statutes, particularly those of a highly penal character, must state all the circumstances which constitute the definition of the offense in the statute, so as to bring the defendant judicially within it. It must be clear and certain to every intent and purpose, and must follow the language employed in the statute in the description of the offense." (*Ike v. State*, 28 Miss. R., 525.)

All statutory indictments for felonies must state the offense in the language (or its equivalent) of the statute, creating or declaring against the crime. (*State v. Noel*, 9 Blackf. R., 548;

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Howell v. Commonwealth, 5 *Grat. R.*, 664; *State v. Brougham, Blackf. R.*, 307; *State v. O'Brien*, 1 *Bailey*, 144; *Hamilton v. Commonwealth*, 3 *Penn. R.*, 142; *State v. Foster*, 3 *Mason*, 442; *State v. Fleetwood*, 14 *Maine R.*, 448; *Commonwealth v. Tucker*, 20 *Pick. R.*, 356; *Hampton's Case*, 3 *Grat. R.*)

Second. The indictment does not aver that the mortgage, upon which the certificate of acknowledgment was indorsed, was ever delivered, or in any other manner executed in fact. Without execution by delivery, the mortgage could no more have a legal existence (being a conveyance of real property), than could a deed under like circumstances; and any certificate of the character of the one in this case, indorsed upon an unexecuted mortgage, can have no lawful operation or legal effect to the end intended, and is, therefore, without that legal existence necessary to make it the subject of a forgery.

Third. The indictment, while charging the certificate to be a forged certificate of acknowledgment, &c., presents it as a true certificate of acknowledgment, &c.

These are the words of the charging part of the indictment: "That the defendant, with force and arms, feloniously did forge, &c., a certain instrument in writing, commonly called a certificate; the same (not purporting to be, but) being a certificate of the acknowledgment, by one Sarah J. Lyon, of a certain mortgage, the said mortgage being an instrument which, by law, might be recorded," &c.

The charging allegation is, that the prisoner forged the "certificate;" but the "descriptive averment"—that part of the indictment which states the facts that constitute the character of the instrument, and which must control—presents it as the true certificate of the acknowledgment, by Sarah J. Lyon, of the execution of a certain mortgage, &c. There is in this, at least, an incongruity fatal to the indictment.

Fifth. The indictment does not charge the defendant with the statutory offense of the forgery of a certificate, but with the forgery of "a certain instrument and writing, commonly called a certificate, the same being a certificate of the acknowledgment," &c.

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The case of *Rex v. Craven* (2 *East P. C.*, 601, 602), (with several analogous decisions, both in this country and England, confirmatory of the law pronounced in that case), shows, in another aspect, that the description of the instrument in this case does not fulfill the requirements of the statute. Craven was indicted under the English statute, which declares the stealing of any "bank note" to be a larceny, and the indictment charged that he stole a certain "note, commonly called a bank note." The twelve judges on the case reserved held this to be an imperfect description, and said that the words, "commonly called a bank note," did not remedy the original insufficient description of the instrument.

So here the words, "commonly called a certificate of acknowledgment," &c., cannot remedy an original imperfect description. See same authorities as those to first point.

Sixth. The face of the certificate shows no venue or place of its execution, or in and for what county or city the commissioner was appointed, or had authority to take acknowledgments of the execution of deeds and mortgages; nor are these defects, or any of them, cured by any averments of such extrinsic facts as became necessary to be proved to supply the imperfections of the certificate.

The statute provides that "no commissioner of deeds shall take any acknowledgment of the execution of any conveyance out of the city or county in and for which he was appointed." (3 *R. S.*, 5th ed., 46.)

"An affidavit without a venue is a nullity, although sworn before a commissioner of deeds whose residence is mentioned in the jurat. It must indicate the county in which it was taken, or it will be void." (*Cook v. Staats*, 18 *Barb. R.*, 407.)

"The venue is an essential part of an affidavit." (1 *Barb. Ch.*, p. 601.)

"An affidavit without a venue, taken before a commissioner of deeds whose residence is not mentioned, is a nullity." (6 *How. Pr. R.*, 394.)

"An affidavit of one county as a venue, sworn before an officer in another county, having authority to take affidavits

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in his county, cannot be read." (2 *How. Pr. R.*, 86, 127, 181.)

Is there any reason why the rule, applicable to affidavits before commissioners, should not obtain in relation to acknowledgments before commissioners? Is not the one as important in the conveying of rights, as the other is in obtaining them? Why should not the caution and certainty of both be equal? Perjury could not be predicated of the one; why should forgery of the other?

It is confidently submitted, that this certificate would not be valid if true.

"An instrument, to be the subject of an indictment for forgery, must be valid, if genuine, for the purpose for which it is made," (*People v. Harrison*, 8 *Barb. R.*, 568, with authorities there cited.)

Seventh. The indictment does not allege that the defendant forged the "certificate" with an intent to cheat and defraud.

The act upon which the intent to defraud is predicated, is the indorsing of the certificate upon the mortgage, after the forgery of it was complete.

From a careful reading of the indictment, it is clear that the intent to defraud is not made to relate to the act of forging the certificate, but to the act of indorsing it upon the mortgage, after it was fabricated.

The indictment treats the certificate as an independent and substantive instrument, entirely distinct from the mortgage, until connected with it by an averment that it was indorsed thereon; "which certificate (then already forged) was indorsed upon the said mortgage, with intent," &c. When or by whom the indorsement was made, is not pretended.

Eighth. The indictment charges that this forgery was committed after the defendant had been convicted and remitted of a previous felony. The verdict is: "Guilty of forgery in the first degree."

This verdict is not responsive to the charge in the indictment, which is forgery in the first degree as a second offense.

A verdict must respond to the charge supposed in the

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indictment, or to one or more of the counts of the indictment, otherwise it will be set aside.

John H. Anthon, for the defendants in error.

There is no bill of exceptions in this case, nor any complete record. All questions raised by the prisoner must therefore appear on the face of the indictment or the entry of judgment, which only are before the court.

I. The question therefore is, whether, upon any supposable proof, testimony or state of facts, the judgment pronounced could have been given upon the indictment returned; the presumption after verdict being that the testimony supported it, and proved everything that could be proved under the indictment. (1 *Greenl. Ev.*, § 19; *Grah. Pr.*, art. "Motion in arr.;" *Thompson v. People*, 3 *Park. Cr. R.*, 208; *Waller v. State*, 4 *Ark. R.*, 37; *Sweetapple v. Jesse*, 5 *Barn. & Ald.*, 27; *Barb. Cr. Law*, § 72; *People v. Holmes*, *MS.*, June Term, 1861; *Reg. v. Waters*, 2 *Bent. & Heard*, 69.)

II. The omission of the words, "purporting to have been made by an officer duly authorized to make such certificate," is wholly immaterial, and the mode of stating the forgery, as a "certificate" instead of "a false certificate," or a "paper purporting to be a certificate," is correct. (*People v. Rynders*, 12 *Wend. R.*, 427; *Thompson v. People*, 3 *Park. Cr. R.*, 208; *State v. Fenley*, 18 *Miss. R.*, 445; *State v. Gardner*, 1 *Iredell*, 27; *People v. Badgley*, 16 *Wend. R.*, 58; *People v. Stearns*, 21 *Id.*, 409; *People v. Warner*, 4 *Barb. R.*, 314; *Charles v. People*, 1 *Comst. R.*, 180; *Whart. Prec. of Ind.*, 284; *Lyons' Case*, 2 *Leach*, 597, 608.) In all these cases, except the last, the indictments were identical in these respects with that under consideration, and the doctrine held is, that "it is sufficient to allege that the defendant forged an instrument setting it out in *hæc verba*, with intent to defraud."

III. The same cases are conclusive upon the question raised by the fifth point for the defendant, "a certain instrument and writing commonly called a certificate, the same being a certifi-

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cate, etc.," followed by the instrument in *hæc verba*, is a good description.

In Craven's case, cited for the defense :

a. The note was not set out in *hæc verba*.

b. The omission was of the word "promissory" or "bank," which were needed to show that the paper was the subject of larceny.

c. The words, "the same being," were omitted.

IV. No averment of the delivery of the mortgage was necessary, especially upon an indictment for the forgery and not the uttering. The delivery was merely evidence of fraudulent intent, and, as such, need not be alleged. It is sufficient if the court see that the instrument might be so used as to defraud. (*People v. Stearns*, 21 *Wend. R.*, 409.)

V. In general, the rule is, that no more certainty is essential in an indictment, than will apprise the defendant of the precise charge against him. (*People v. Powers*, 3 *Seld. R.*, 50; *People v. Tredway*, 3 *Barb. R.*, 470; *Biggs v. People*, 8 *Id.*, 547; 5 *Wend. R.*, 10; *People v. Taylor*, 3 *Denio R.*, 91; *Buller v. People*, 4 *Id.*, 68.)

VI. If the certificate, in the form in which it appears in the indictment with the omission in the venue, would be void, then the conviction must be sustained because :

a. The court must intend that the indictment and verdict were supported by appropriate proof (see cases under point I), and that the forgery charged consisted in the very act of making a certificate, originally complete, assume this appearance, that is, by a material erasure ; and,

b. Such charge would be well stated by an indorsement, alleging the forgery of the entire instrument as it appeared after the erasure. (*Arch. Cr. Pl.*, 428; *Rex v. Teague*, 2 *East R.*, 978, 979; *Rex v. Atkinson*, 3 *Car. & Payne*, 699; *Whar. Cr. Pl.*, 428; 1 *Iredell*, 24; *Ib.*, 13; *Ib.*, 491; *Case of J. B. Holmes*, cited above; *State v. Flye*, 26 *Maine R.*, 312.)

VII. If the omission in the venue of the certificate originally existed, it could have been supplied by parol proof that the acknowledgment was in fact taken in the place for which

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the commissioner was appointed, and the court must intend that it was so supplied, and that the forgery charged consisted of some other material erasure or alteration. (*People v. Tredway*, 3 Barb. R., 470; *Jackson v. Gumaer*, 2 Cow. R., 552.) In the last case the name of the State was omitted. (*R. v. Birkett, Russ. and Ry.*, 86.)

VIII. If the certificate as it appears in the indictment is a valid certificate, then the conviction must of course be sustained.

IX. The statute does not require any place of execution to be noted on the certificate. The only law on the subject prohibits a commissioner from actually taking an acknowledgment out of the place of his appointment. It is directory merely, and does not make the instrument void, and instruments not complying with directory statutes, are subjects of forgery. (*Lynch v. Livingston*, 2 Seld. R., 422; *Bishop Cr. Law*, § 443; *Barb. Cr. Law*, § 117; *Roscoe's Cr. Ev.*, § 291; *R. v. Lyon, Russ. and Ryan*, 255; 2 *Russ. on Cr.*, 350, and cases cited; *People v. Rathbone*, 21 *Wend. R.*, 509.)

X. The intent to defraud is well stated, and must, by any reasonable construction of the language, be referred to the forgery as well as to the contemporaneous and identical act of indorsing the same forged certificate.

XI. On indictment for forgery in the first degree as a second offense, the jury can find the prisoner guilty of forgery in the first degree, and negative the previous conviction, and so they did in this case. The form of their verdict does not appear and is not called for, but the sentence is for forgery in the first degree. (*Palmer v. People*, 5 *Hill R.*, 427.)

By the Court, SUTHERLAND, J. There is no bill of exceptions in this case, nor any complete record.

The only questions in this case relate to the sufficiency of the indictment, and to the form of the verdict and consequent judgment.

The indictment, if it charges any crime, charges forgery in the first degree, after conviction of a previous felony. The

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verdict and sentence were for forgery in the first degree, without noticing the alleged conviction of a previous felony. As we have nothing but the indictment and entry of judgment before us, we cannot say whether there was on the trial any proof of a previous conviction; but whether there was, or was not, the form of the verdict was well enough. Certainly the prisoner cannot complain that the jury did not take into consideration his previous conviction, if proved.

The only question in the case, then, is, whether the indictment charges the offense of forgery in the first degree.

The allegation in the indictment is, that the prisoner feloniously did forge, &c., "a certain instrument in writing, commonly called a certificate, the same being a certificate of the acknowledgment, by one Sarah J. Lyon, of a certain mortgage, the said mortgage being an instrument which, by law, might be recorded," setting forth the certificate in *hæc verba*.

The certificate, as thus set forth, purports to have been made by Abram W. Kennedy, commissioner of deeds, but it has no venue, that is, the acknowledgment which it certifies does not by its purport to have been taken in any particular county or city of the State, and there is nothing on its face to show of what county or city Kennedy was a commissioner. The certificate commences,

"State of New York, County, ss.:"

The name of the county being omitted, otherwise it is in the usual form.

The statute (3 R. S., 5th ed., 949), declares the forging, &c., of "any certificate or indorsement of the acknowledgment, by any person, of any deed or other instrument which, by law, may be recorded, made, or purporting to have been made, by any officer *duly authorized* to make such certificate or indorsement," forgery in the first degree.

The indictment in this case does not allege that the certificate was made, or (in words) that it purports to have been made by an officer authorized to take the acknowledgment or to make the certificate, but as the certificate is set forth in *hæc verba*, the indictment does, in effect, and sufficiently allege,

that it purports, whatever the certificate as set forth in the indictment purports. (*People v. Rynders*, 12 *Wend. R.*, 427; *People v. Stearns*, 21 *Wend. R.*, 409.)

The question, then, is whether the certificate, as thus set forth, does purport to have been made *by an officer duly authorized to make it*.

It purports to have been made by Abram W. Kennedy, as a commissioner of deeds, and a commissioner of deeds is an officer authorized to take and to certify the acknowledgment of deeds, &c.; but they are local officers, appointed for particular counties and cities, and the statute declares that a commissioner of deeds shall not take such acknowledgments out of the city or county for which he was appointed. (8 *R. S.*, 46, § 4, 5th ed.)

The question is not whether the certificate, as set forth in the indictment, purports to have been made by a commissioner of deeds, but whether it purports to have been made by a commissioner of deeds authorized to make it, or to take the acknowledgment which it certifies. It certainly does not, for it does not purport to have been made, or that the acknowledgment was taken, in any particular county or city of the State.

The authority or jurisdiction of the officer depending on locality, it would seem to follow that the certificate, as set forth, cannot purport that Kennedy was authorized to make it, or take the acknowledgment in the absence of any venue, or of anything on its face to indicate in what county or city it was made, or the acknowledgment taken.

It has been held that an affidavit without a venue is a nullity. (*Cook v. Staats*, 18 *Barb. R.*, 407; *Lane & Laing v. Morse & Studley*, 6 *How. Pr. R.*, 395.)

No crime, then, is charged in the indictment, for there is in it no allegation, formally or otherwise, as to one of the circumstances constituting the statutory definition of the crime, to wit, the authority of the officer. (*People v. Allen*, 5 *Denio R.*, 76.) We cannot suppose that any possible evidence on the trial could have remedied this defect in the indictment, for no pos-

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sible evidence could make the certificate, as set forth in the indictment, purport more or differently from what it does.

We are bound to presume that the evidence verified the indictment, but we have no right to presume that it verified facts or circumstances entering into the definition of the crime not alleged in the indictment.

My conclusion is, that the judgment of the General Sessions should be reversed.

Judgment reversed.

SUPREME COURT. Monroe General Term, March, 1860. *Smith, Johnson and Knox*, Justices.

JAMES McDERMOTT, plaintiff in error, v. THE PEOPLE, defendants in error.

On the trial of an indictment, under 2 R. S., 698, § 3, for an attempt to commit arson, it appeared that the prisoner, having prepared camphene and other combustibles, and placed them in his room, solicited McD. to use them in burning a barn of S. D., and promised to give him a deed of land if he would do so, and it was held that the proof was sufficient to warrant the conviction.

Form of an indictment for an attempt to commit arson in the third degree.

THIS case came before the court on a writ of error to the Court of Sessions of Monroe county.

The first count of the indictment against the plaintiff in error, was as follows:

State of New York, Monroe County, ss.

The jurors of the People of the State of New York, in and for the body of the county of Monroe, aforesaid, upon their oaths aforesaid, do present: That James McDermott, on the first day of February, 1859, at the town of Greece, in the said county, did attempt, unlawfully and feloniously to set fire to, and burn

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a certain barn of Samuel Davison, there situate, with intent to injure the said Samuel Davison, against the form of the statute, in such case made and provided, and against the peace of the People of the State of New York, and their dignity.

The second count also charged an attempt to burn the barn, and the third and fourth counts were for inciting Henry McDonnell to burn it.

The prisoner pleaded not guilty, and, after a trial, he was found guilty, and sentenced to three years' imprisonment in the State prison.

Thereupon, a writ of error was sued out, and the record removed into this court.

The facts sufficiently appear in the opinion of the court.

The cause was argued by —

T. Hastings, for the plaintiff in error.

Calvin Huson, for the People.

By the Court, KNOX, J. The indictment upon which the defendant was convicted at the Monroe Sessions, in 1859, and sentenced to be imprisoned in the State prison at Auburn for three years, contains four counts. The first and second allege that the defendant "did attempt, unlawfully and feloniously, to set fire to and burn a certain barn," &c.; and the third and fourth charge that "the defendant did, unlawfully, falsely and maliciously, solicit and incite one Henry McDonnell, unlawfully, &c., to set fire to the barn," &c.

On the trial, it was proved that the barn mentioned was on a farm owned and occupied by one Davison, with whom the prisoner had had much difficulty; that a barn had previously been burned on the same premises, and that the defendant went to McDonnell and said to him that "the place of Davison gave him a great deal of trouble, and he wished to get some one to burn it up; he said if I would burn the place he would give me the deeds and assign over all his right and title to me of the place; when he spoke of burning, he used the word 'building' or 'premises'; he said he had camphene and

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other combustibles in his room; he said if I would go out there he would furnish a horse and buggy to bring me back; he said it would be hitched or standing at a gate about the premises, on the Paddy Hill road," etc.

The principal question is, did the evidence support either count in the indictment? or, to state it more precisely, can a person be convicted properly, under this evidence, of the offense mentioned in the following section of the statute? "Every person who shall attempt to commit an offense prohibited by law, and in such attempt shall do any act toward the commission of such offense, but shall fail in the perpetration thereof, and shall be prevented or intercepted in executing the same, shall be, upon conviction, punished," &c. (3 R. S., 5th ed., p. 583, sec. 3; 2 R. S., 1st ed., 698.)

Were it not for the elaborate and learned brief which the defendant's counsel has furnished, I should not hesitate a moment to say that the conviction was right; and sustained by the case of *The People v. Bush*, 4 Hill R., 133. But, as the soundness of the opinion in that case is questioned, it may not be unprofitable to examine the question here, in the light of reason, as well as authority.

The two important and essential facts to be established to convict a person of an offense, are, first, an intent to commit the offense; and, second, some overt act consequent upon that intent toward its commission. So long as the act rests in bare intention, it is not punishable; *cogitationis poenam nemo patitur*. It is only when the thought manifests itself by an outward act in or toward the commission of an offense, that the law intervenes to punish. As we cannot look into the mind to see the intent, it must, of necessity, be inferred from the nature of the act done, and if that be unlawful, a wicked intent will be presumed. These are fundamental legal principles. Now, applied to the facts of this case, what do we find? We find that the defendant intended to commit the crime of arson; indeed, he had committed the offense "already in his heart." What were the overt acts toward the commission? He had prepared camphene and other combustibles, and had them in

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his room, and then he went a step further and solicited McDonnell to use those combustibles to burn the building, promising him, if he would do so, to "give him the deeds of the place, and assign to him his right in the same." We have, then, the fixed design of the defendant to burn this barn, and overt acts toward the commission of the offense, and a failure in the perpetration of it. The offense, then, is fully made out, for the intent to do the wrongful act, coupled with the overt acts toward its commission, constitutes the *attempt* spoken of by the statute.

There are one or two other questions raised by the defendant, but I consider them, and it is evident that his counsel does, of no moment. The conviction was right, and should be affirmed.

SUPREME COURT. New York General Term, February, 1861.

Clerke, Sutherland and Allen, Justices.

WILLIAM MULLIGAN, plaintiff in error, v. THE PEOPLE,
defendants in error.

On the trial of a prisoner for attempting to discharge a pistol with the intent to kill, &c., under 2 R. S., 665, § 36, the prisoner's counsel requested the judge to charge "that the pointing of an uncocked Colt's revolver at a person is not an attempt to discharge the weapon," and the judge refused so to charge, and charged that it was a question of fact for the jury to decide, and not a question of law for the decision of the court; Held, that the ruling of the judge was erroneous, and the prisoner, having been convicted, the judgment was reversed on writ of error, and a new trial ordered.

A conviction for an attempt to discharge a pistol, under the statute referred to, cannot be had, where the individual indicted proceeded no farther toward an actual discharge or shooting than to raise and point the pistol, uncocked, at the party threatened.

A threat made by the prisoner at the time would constitute no part of the attempt to discharge the pistol; it would only be evidence of the intention of the prisoner.

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ERROR to the Oyer and Terminer of the city and county of New York, where the plaintiff in error was tried and convicted, before Mr. Justice GOULD, of having attempted to discharge a loaded pistol at one Oliver, with intent to kill him, and was sentenced to four years' imprisonment in the State prison.

At the close of the evidence, the judge was requested by the prisoner's counsel, to charge that the pointing of an uncocked Colt's revolver at a person, is not an attempt to discharge the weapon. The judge refused so to charge, holding that it was a matter of fact to be left to the jury, and not a question of law to be decided by the court, to which the prisoner's counsel excepted.

Other questions were raised on the trial, but not having been considered by the court, on review, it is unnecessary to state them.

James T. Brady, for the plaintiff in error.

Nelson J. Waterbury (District Attorney), for the People.

By the Court, ALLEN, J. The plaintiff in error was convicted of attempting to discharge a loaded pistol at one Oliver, with intent to kill him, and sentenced to the State prison for four years, upon which conviction, error was brought to this court.

Several questions arise upon exception to the rulings and decisions of the learned judge, in the progress of the trial, which it will not be necessary to consider, if my brethren concur with me upon the main question presented by the record.

The prisoner was in a common gambling house, of which Morrissey, one Dancy, and others, were proprietors, and while conversing peaceably with Dancy, was ordered out of the house by Morrissey. Not leaving in pursuance of the request, Morrissey procured the attendance of Oliver, who was one of the police officers of the city of New York, and requested him to remove the prisoner from the premises. The prisoner refused to go, or did not leave, at the request of the officer, and

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the latter advanced toward him with a view to eject him from the house. The evidence tended to show that the prisoner retreated as the officer advanced, and took from his pocket a loaded pistol and pointed it at the officer, using threatening language, indicating an intent to discharge it if the officer put his hand on him, or advanced toward him. The pistol was not cocked.

The prisoner was not in the act of committing an offense against the law, and was not liable to arrest by the officer, and there was no resistance to Oliver as an officer. While attempting to remove the prisoner from the house, Oliver was not in the line of his duty as a member of the police. The house was a public gaming house to which the prisoner had on other occasions resorted for play, and aside from the license implied from the character of the house, the actual permission before given to the prisoner to be and remain in the house, was an invitation and express license to him to enter it at any and all times until the license should be revoked. He was not, therefore, a trespasser, or guilty of a breach of the peace by entering the house at the time of the alleged assault. But the license was revocable at the pleasure of the proprietors, and when revoked, he could neither lawfully enter or remain upon the premises.

Notwithstanding the illegal and offensive character of the business of Morrissey and Dancy, the premises and the possession of the proprietors were under the protection of the law, and no one had the right to intrude upon them against the wishes of the owners. There is some evidence that the officer considered the business of the house, as well as the house itself, under the protection of the law, and the proprietors entitled to the aid of the police force to preserve order in carrying on the business rather than in suppressing it, and thus effectually preventing breaches of the peace and violation of the law. It is proper to say that in the excess of zeal to protect the gambling house and its business, Oliver acted without and against the orders of his superior, Captain Dilks.

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Had he followed the instructions of Captain Dilks, he would have kept within the exact line of his duty.

Breaches of the peace resulted almost necessarily from the character of those who were drawn together by the attraction of the place, and the business of the house was a nursery not only for those offenses which come under the head of breaches of the peace, but for every vice and crime that infest the community, and why this police officer should have deemed it his duty so far to protect and encourage gambling, and a house for gambling, as to interfere with those who were not guilty of any offense, and were not committing a breach of the peace, merely because their presence was offensive to the keeper of the house, it is not easy to see. He was literally using his office as a "shield" for a public nuisance. The remark of the prisoner to the officer: "Don't you see that this is a gambling house: you had better attend to this than to arrest me," was very proper, and if the officer had heeded it, and the direction of Captain Dilks, and merely done his duty, no offense would have been committed by the prisoner, and this conviction would not have been had. Perhaps even the Metropolitan police cannot suppress all the gaming-houses, but they are not bound to undertake their regulation and management. As there was no breach of the peace or other offense committed in the presence of the officer, he, as such, had no authority to interfere with or molest the prisoner, and the display of his "shield" did not add to his powers. All the authority he had was as the servant of Morrissey, the proprietor of the house. As such he could have done, at his request, precisely what Morrissey himself could have done, that is, upon the refusal of the prisoner to leave the house, upon being requested so to do, he could have removed him, using just that measure of force necessary to accomplish that purpose and no more. The prisoner could not have been indicted for resisting Oliver as an officer. (*Reg. v. Mabel*, 9 *Car. & Payne*, 474.) The officer went beyond his duty as such in attempting to remove the prisoner, and was not, therefore, within the protection of the law as an officer. (*Wheeler v.*

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Whitney, Id., 262.) But as the servant of Morrissey, and acting for him, he had a right to remove the prisoner, and as no question arises upon an alleged resistance to a public officer in the discharge of his duty, so there is no question as to the degree of force used by the officer in the expulsion of the prisoner. The principal and only important question is upon the construction of the act under which the prisoner was convicted, and that question was directly presented by the request of the prisoner's counsel to the court, to charge the jury that the pointing of an uncocked Colt's revolver at a person was not an attempt to discharge the weapon, which instruction was refused, and the jury were charged in substance that it was for them to say, upon the evidence, whether the act was or was not an attempt to discharge the pistol.

The statute under which the prisoner was convicted declares that "every person who shall be convicted of shooting at another, or attempting to discharge any kind of fire arms, &c., with the intent to kill, maim, &c., shall be punished," &c. (2 R. S., 665, sec. 36), and the question presented is, whether a conviction can be had for an attempt to discharge a pistol when the individual indicted has proceeded no further toward an actual discharge of shooting than to raise and point the pistol, uncocked, at the party threatened. There was no evidence of an attempt to cock the pistol or to pull the trigger, and the jury would have been warranted in finding that the prisoner merely raised the pistol and pointed it at the officer, making the qualified threat before stated. The instruction was properly asked for upon the evidence. The threat constituted no part of the attempt to discharge the pistol, and was only evidence of the intention of the prisoner. The statute quoted does not declare that every person who shall shoot or attempt to shoot at another shall be punished upon conviction as therein prescribed, but it is that every person who shall shoot, or shall attempt to discharge any fire arms, &c., shall be punished, &c., evidently indicating that the attempt, the act preparatory to the principal act prohibited, must be proximate and an attempt to do the specific thing named, to wit, dis-

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charge the gun or other fire arms. The statute is not aimed at, neither is the indictment and conviction for an assault with intent to kill. A person might make an assault with loaded pistol in his hand, and yet make no attempt to discharge it, and would not be within the provision of the statute. The English statutes, as well (1 *Vict.*, *ch.* 85) as the prior statutes for which that was a substitute, are somewhat more marked and distinct in their language than our statute. They are to the effect that "whosoever shall shoot at any person, or shall, by drawing a trigger, or in any other manner, attempt to discharge any kind of loaded arms at any person, &c., shall be liable," &c. The principal difference between our own statute and that of 1 *Vict.*, is that the latter punishes an "attempt to discharge a gun, &c., by drawing a trigger, or in any other manner," and our own punishes an attempt to discharge a gun, without referring to the means; that is, punishes the attempt to discharge a gun in any manner, which is no broader than the expression "any other manner" in the English statute. Any act toward the discharge of a loaded gun, and calculated to accomplish this purpose, would be an attempt, under the English act, and nothing short of this would constitute the offense under the Revised Statutes. Our statute was not intended to differ from the English statutes, except by providing a mitigated punishment for the attempt, and thus distinguishing it from the consummated offense, which the English acts did not. (*Rev. Notes*, 3 *R. S.*, 2d *ed.*, 815.) That which would not be an attempt to discharge a gun in any manner other than by drawing the trigger, under the English act, would not be an attempt to discharge it under the Revised Statutes of this State. The very question made here was decided in *Reg. v. Lewis* (9 *Car. & Payne*, 523), by ARABBIN, Sergeant, after consulting with PATTERSON, J., and the jury were instructed that to sustain an indictment for attempting to discharge a loaded blunderbuss at the prosecutor, there must be something more than the mere presenting of the blunderbuss, and that some act must be shown to have been done by the prisoner to satisfy the jury that he did in

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fact attempt to discharge the blunderbuss. The object of the English and our own statute is the same, to punish proximate attempts, those attempts which immediately lead to the discharge of loaded arms. (*Reg. v. St. George, 9 Car. & Payne, 488.*) It is not an attempt to discharge a loaded gun or pistol to put oneself in a situation in connection with the gun or pistol that it may be discharged. A mere getting it in readiness to discharge is not an attempt to discharge it. Upon the trial, an assault with intent to kill was confounded with the specific, statutory and entirely different offense charged, an attempt to discharge a loaded pistol with the like intent. The act, the attempt to commit which was made an offense, was the discharge of fire arms. No matter what other offense was committed against the laws, or the person of the officer, if this offense was not committed, the prisoner was wrongfully convicted. It is far from certain that any offense was committed by the prisoner, but of that we are not the judges. We are only to decide upon the present conviction.

The prisoner may be, as was very strenuously urged, a very bad man, but he is nevertheless entitled to the same measure of justice, and to be judged and acquitted, or condemned, by the same rules of evidence and of law which are applied in every other case. It will not tend to make bad men better to convict and punish them without or against law. The laws and the administration of justice will not be more respected to have it understood that rules of law and constructions of statutes can be made to bend to the exigencies of particular cases, and that men can be condemned for general bad character rather than upon proof of specific offenses. In passing upon evidence, judging of acts and intents, and deciding, as a question of fact, upon the guilt or innocence of a party, character is an important element, and in a doubtful or balanced case may properly turn the scale, but not so in passing upon legal questions. They are to be decided as abstract questions, and penal statutes are to be construed by the same rules, whatever may be the character of the individual to be affected by the decision. There may have been an assault with intent

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to do bodily harm or to kill. (*Hays v. The People*, 1 *Hill R.*, 351.) If it be conceded that the prisoner could have been convicted of an attempt to kill, by reason of having done an act preparatory, or taken one step toward the commission of the offense, it still does not follow that he has attempted to discharge the pistol. He might be said to have attempted murder had he solicited another person to shoot the officer, but that would not have been an attempt to discharge the pistol, the specific offense charged. (*Rex v. Higgins*, 2 *East R.*, 5; *People v. Bush*, 4 *Hill R.*, 133.) An attempt is an endeavor to do an act carried beyond mere preparation, but falling short of execution of the ultimate design. (*Bouvier's Law Dic.*) Loading a pistol would be a preparation to shoot, but not an attempt to discharge. So, to get possession of a pistol, to take it from the pocket and to point it, would be a preparation to discharge it, but not an attempt to discharge it. It may not always be easy to determine where the line is which separates a preparation to perform a given act from an attempt to perform the act. But the act which is characterized as an attempt must be proximate to the principal thing to be accomplished, a means to the end, and the pointing of a pistol uncocked is not an attempt to discharge it, punishable under the statute. Fire arms are usually discharged by drawing a trigger, but they may be discharged in any way by which the powder can be ignited and made to explode, and the attempts to discharge may be as diversified as the means of discharge are various, but can only be by some act, which, carried out and perfected, will result in a discharge.

The conviction must be reversed, and a new trial granted.¹

¹ This case was carried on behalf of the people, by writ of error, to the Court of Appeals, where the judgment of the Supreme Court was affirmed.

SUPERIOR COURT. At Chambers, New York, October, 1861.
Before *Murray Hoffman*, Justice.

THE PEOPLE *ex rel.* MARY ALLEN *v.* DANIEL H. BURTNETT.

To authorize an application for a writ of *habeas corpus* to an officer residing in a county adjoining that in which the prisoner is detained, under 2 *R. S.*, 563, it must be shown that there is no officer of competent jurisdiction within the county of the detention, or if any reside there, that he is absent or is incapable of acting, or has refused to grant the writ. It is not sufficient for the applicant to state generally in his affidavit that he could find no such officer.

Where the application was made to an officer in an adjoining county, on the sixteenth of the month, on the ground that the county judge of the county in which the prisoner was detained, was absent from the county, and the affidavit showing the fact of his absence was made on the thirteenth of the same month, it was held to be insufficient, and that an affidavit of a later date should be produced, showing that the county judge had not returned in the *interim*.

Where there has been a previous decision on *habeas corpus* before another officer, on the same facts, the motion will be deemed *res judicata*; if such previous decision was wrong, the only mode of correcting it is by *certiorari*.

Whether the enlistment of a minor, over eighteen years of age, as a private in the army of the United States, without the consent of his parents, is not valid under the legislative provisions of this State — *Quere*.

THE relator obtained a writ of *habeas corpus*, and asked for the discharge of William Allen, who enlisted in August, 1861, in the regiment of which respondent is lieutenant-colonel, and was subsequently mustered into the United States service. It was alleged in the petition that Allen was between the age of eighteen and twenty-one years.

The following return was put in by the respondent :

Daniel H. Burnett, respondent above named, for an amended return to the writ of *habeas corpus* herein issued by the said Justice HOFFMAN, on the 16th day of September, 1861, respectfully shows: That the said William Allen, on or about the 15th day of August, 1861, duly enlisted as a private soldier in the Governor Morgan United States light artillery regiment, of which this respondent is acting lieutenant-colonel, and was, in due form of law, mustered into the military service of the

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United States as such private soldier ; that from the date of his enlistment as aforesaid until the present time, he has continued as such private soldier in such regiment, and has not been otherwise restrained of his liberty. That on or about the 14th day of September, 1861, a writ of *habeas corpus*, in due form of law, in the city of New York, was issued on behalf of the said William Allen, returnable on the 16th day of September, 1861, at 11 o'clock A. M., before Hon. GEORGE G. BARNARD, one of the justices of the Supreme Court, at the chambers thereof, in the park in the city of New York. As this respondent is informed and believes, in the petition on which such writ was issued, the same facts and the same imprisonment or restraint of liberty, in substance and effect, were stated as are stated in the petition for the writ herein allowed by said Justice HOFFMAN. On the said 16th day of September, in obedience to such writ, and at the time and place therein stated, the body of said William Allen was produced before the said Justice BARNARD, and a return to the said writ issued by him, was, in due form of law, made by the officer commanding said regiment, and having the said William Allen in his custody. Immediately thereafter, said Justice BARNARD proceeded to examine into the facts contained in such return, and into the cause of confinement and restraint of the said William Allen ; that upon such examination, it appeared that said William Allen was a minor, under the age of twenty-one years, and that he enlisted and was held as a private soldier, as hereinbefore set forth, without the authority or consent of his parent or guardian. The said Justice BARNARD did thereupon decide and adjudge that the said William Allen was not entitled to be discharged, and accordingly, in due form of law, dismissed such writ, and remanded the said William Allen to the custody of the officer of such regiment having him in his charge and custody.

D. HENRY BURNETT, *Lieut.-Col.*

New York, October 2, 1861.

The return was duly verified.

No answer to the return was put in by the petitioner.

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J. O'Rourke for the petitioner, moved for the discharge of the minor, relying upon *Dabb's Case* (12 *Abbott's Pr. R.*, 113).

Henry L. Clinton, for the government, objected :

I. That the preliminary proof necessary to give Judge *HOFFMAN* jurisdiction of the subject matter, had not been adduced before him prior to granting the writ; citing 3 *R. S.*, 5th ed., 884, § 38, which provides that "Whenever application for any such writ, shall be made to any officer not residing within the county where the prisoner shall be detained, he shall require proof by the oath of the party applying, or by other sufficient evidence, that there is no officer in such county authorized to grant the writ, or, if there be one, that he is absent or has refused to grant such writ, or for some cause to be specially set forth is incapable of acting; and, if such proof be not produced, the application shall be denied."

Counsel contended that the affidavit intended to supply this proof was insufficient. 1st, because it was made, not in this but in another proceeding, to wit: on the application for a *habeas corpus* before Justice *BARNARD*; 2d, that aside from this technical objection, the affidavit was insufficient, for the reason that it merely stated that at the time it was made (which was several days before the application for a *habeas corpus* in this proceeding) the county judge authorized to issue a *habeas corpus* in the county, where it was alleged the minor was restrained of his liberty, was absent, or could not be found. *Non constat*, he had returned, and could be found before the application for the writ in the present proceeding was made.

II. Counsel contended that, inasmuch as the matter had been once decided by Justice *BARNARD*, upon the same facts, and between the same parties, the decision of Justice *BARNARD* was *res adjudicata*, and could only be reviewed upon *certiorari*, citing *Mercein v. People*, 25 *Wend. R.*, 64; *People v. Cassels*, 5 *Hill R.*, 164; *Matter of De Costa*, 1 *Park. Cr. R.*, 129.

HOFFMAN, J. The relator has established that William Allen, her son, was a minor, over the age of eighteen and

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under twenty-one years, and enlisted without the consent of either of his parents. It appears from the return to the writ that on the 15th of August, 1861, he enlisted as a private soldier, in the Governor Morgan United States light artillery, and was in due form of law, mustered into the service of the United States, as such private soldier. It further appears that on the 13th of September, 1861, an application for *habeas corpus*, was made to Mr. Justice BARNARD, of the Supreme Court of this district, upon an affidavit sworn to on that day, that the deponent had made inquiries in Richmond county, for a magistrate of competent jurisdiction, to grant the writ of *habeas corpus*, and that he could find none, the county judge being absent from said county and gone to the western part of the State of New York.

The petition in that case stated that the party was deprived of his liberty, at camp Law, Richmond county. The petition in the present instance, states the same fact.

It further appears from the return, that Mr. Justice BARNARD, on the 16th of September, 1861, inquired into the facts; that the fact of minority was ascertained, and of enlistment without consent. He decided that the party was not entitled to his discharge, and remanded him to the custody of the officer, who now produces him. Several objections are made to the discharge being granted. By the statute (3 R. S., 5th ed., 883, §§ 37, 38; 2 R. S., 563), application for the writ may be made to the Supreme Court during its sitting, or during its term or vacation, to any one of its justices, or any officer who may be authorized to perform the duties of a justice of the Supreme Court, at chambers, being or residing within the county where the prisoner is detained; or if there be no such officer within such county, or if he be absent, or for any cause be incapable of acting, or have refused to grant such writ, then to some officer having such authority, residing in any adjoining county. There must, in such case, be sufficient evidence given that there is no officer in the county of the detention authorized to grant the writ, or that he is absent, or has refused

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to grant it, or is incapable of acting for some cause specially set fourth.

The affidavit produced is liable to the objection that it does not explicitly state that there is no officer in the county, other than the county judge, authorized to grant the writ, only that the deponent could find none.

It is subject, also, to the difficulty that it was made on the 13th of September, and used on the 16th of that month; before Justice BARNARD. On the same day, the 16th, the present application was made. The county judge might have returned in the interim. An affidavit of a later date should have been produced.

I think these objections well taken. It is next insisted that the decision of Mr. Justice BARNARD is *res judicata* upon the same facts in the same case, and the only mode of correcting it, if wrong, is by *certiorari*.

The case of *Mercein v. The People*, in the Court of Errors, (25 *Wend. R.*, 64; *see p.* 106,) is a distinct authority to the very point, and has remained unchanged. (*See 1 Park. Cr. R.*, 129.)

This objection is fatal to the application. Another point has been raised as to whether the party is not so brought within the act of our own legislature as to make his enlistment valid, being over eighteen years of age, without the consent of his parents.

Upon this question the act of the militia (1 *R. S.*, 285), the 21st section of article one, title five (*Id.*, 296), and the act of April 15, 1861 (*Sess. Laws, ch.* 277), may be referred to, as also the 12th section of the act, chapter 304, of 1835. I need not pass upon this point.

The application must be denied, and the prisoner remanded to the custody of the officer making the return.

SUPREME COURT. Kings General Term, February, 1861.

Emott, Brown and Scrugham, Justices.

PETER DAWSON, plaintiff in error, v. THE PEOPLE, defendants in error.

The proceedings of a County Court of Sessions on the trial of an indictment, will not be reviewed on writ of error by the Supreme Court, until a record of judgment shall have been made up and filed; and when a return to a writ of error was defective in this respect, on motion of the district attorney, the writ of error was quashed.

THIS was a writ of error to the Court of Sessions of the county of Kings. The return contained an extract from the minutes kept by the clerk, showing that on the 10th December, 1858, the prisoner was arraigned for an assault and battery, with an intent to kill, and pleaded not guilty. Also, another extract from the minutes of the clerk, by which it appeared that on the 15th of December, 1858, the prisoner was tried for an assault and battery, with intent to kill, and found guilty by the jury. Also, an extract stating that on the 23d December, 1858, he was sentenced to imprisonment in the State prison at Sing Sing, for nine years and six months. The last extract, as appeared by the certificate of the clerk, was a memorandum written in pencil upon a piece of paper pinned to one of the leaves of the book containing the minutes.

No record of judgment was returned, and never had been made up, and the clerk certified that he had made search for the indictment in his office, and was unable to find it.

John Winslow (District Attorney), moved to quash the writ of error.

S. H. Stuart, for the plaintiff in error.

By the Court, EMOTT, J. There is nothing brought before us by this writ of error but the rough minutes of the arraignment and trial of the plaintiff in error in the King's County Court of Sessions, together with a copy of a memorandum, which is not even a part of the minutes, and a certificate that

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the indictment cannot be found. The clerk has neglected his duty to enter the judgment in the minutes, and the then district attorney failed to make up the record. (2 R. S., 738.) I do not perceive, however, that these omissions of the public officers can be at present of any avail to the prisoner. There is no judgment of the Court of Sessions brought up by the writ of error, and, therefore, there is nothing for us to reverse. The return does not disclose the fact of any judgment or sentence. I do not regard the pencil memorandum which the clerk certifies to be attached loosely to a book of the minutes of the Court of Sessions, as any part of a record. The prisoner cannot review the proceedings upon his trial by a writ of error until a record has been made up, and the 4th section of article one, title six, chap. two, part four of the Revised Statutes points out the manner of doing so, and fully protects his rights.

The present writ of error should be quashed.

SUPREME COURT. Monroe General Term, December, 1860.

Smith, Johnson and Knox, Justices.

JAMES M. WIXSON, impleaded, &c., plaintiff in error, v. THE PEOPLE, defendants in error.

Where two or more persons, jointly indicted, are all put on trial together, neither one of the defendants can, until discharged from the indictment, be a witness for or against the others.

Where two or more persons, jointly indicted, are tried separately, one of the defendants not on trial may, by permission of the court, be called and examined as a witness on behalf of the People against the defendant on trial, though the person so called and examined has not been convicted nor acquitted, nor otherwise discharged; but a defendant in a joint indictment cannot, while the indictment is pending against him, be called as a witness for his co-defendants, though he be tried separately. (The case of *The People v. Donnelly*, 2 Park. Cr. R., 182, disapproved.)

Though it rests in the discretion of the court to decide whether a co-defendant may, on such separate trial, be called as a witness on behalf of the People,

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no formal application is necessary; and where a co-defendant was offered on the trial as a witness, and was objected to on the ground that he was a co-defendant, and could not be sworn except by special leave of the court, and the objection was overruled by the court, the decision was held to be equivalent to an order made on a special application to the court.

Where, on a criminal trial, one of the defendants is a competent witness on behalf of the People, the wife of such defendant is also a competent witness. It is not erroneous for the court to charge the jury, on the trial of an indictment, that they may convict upon the uncorroborated testimony of an accomplice.

Where, on the trial of Wixson for burglary and larceny, the court charged the jury "that though Wixson had no part in breaking the store and taking the goods, yet if he knew it was to be done by Lockwood and Lee, or either of them, and the goods were immediately taken to his house, and he aided in furnishing a box to secrete the goods, and directed where they should be placed to avoid discovery and prevent the owner from finding them, so as to convert them to his own use, then he was guilty of larceny," the charge was held to be erroneous; and Wixson having been convicted of larceny on such a charge, the judgment was reversed.

A felony may be committed through the instrumentality of an agent without the presence of the principal, when the agent is an innocent party; but if the person employed is guilty, he is the principal in the felony, and his employer is only an accessory.

So, a felony may be committed by a person constructively present, though not actually present; but to be constructively present, he must be of the party and do some act in execution of the common design, or be near enough to the scene of operations to assist in carrying it out, or to aid those who are immediately engaged in it to escape, should necessity require.

ERROR to the Court of Sessions of Steuben county. An indictment had been found against James W. Wixson, Henry Lee and Lester Lockwood, containing three counts. The first was for burglary, the second for larceny, and the third for receiving stolen goods, knowing them to be stolen.

Wixson and Lee demanded to be tried separately from Lockwood, but consented to be tried together. The trial accordingly proceeded against Wixson and Lee.

After several witnesses had been examined on the part of the People, the district attorney called as a witness, Lester Lockwood, one of the prisoners indicted. The counsel for Wixson and Lee objected to his competency as a witness, on the following grounds:

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1. That an accomplice cannot be sworn as a witness, except by special leave of the court.

2. That Lockwood being jointly indicted, and the indictment being still pending and undisposed of, he cannot be sworn as a witness for or against those with whom he stands jointly indicted.

The court overruled the objection, and allowed Lockwood to be sworn and examined as a witness in behalf of the People, and the counsel for Wixson and Lee excepted.

Eliza Lockwood, the wife of Lester Lockwood, was also called and examined as a witness on behalf of the People, against the objection of the counsel for Wixson and Lee; and to the decision that she was a competent witness, the counsel also excepted.

The court charged the jury that they had the right to convict on the testimony of the accomplice alone, if they were satisfied that he had testified to the exact truth; to this the counsel for the prisoners excepted.

The court also charged, that it was enough if the accomplice was corroborated as to the material facts, or some of the material facts and circumstances attending the commission of the crime, and that it was not necessary that the public prosecutor should furnish any corroborating evidence connecting the prisoner with the commission of the offense charged in the indictment. To this the prisoners' counsel also excepted.

The court also charged, that though Wixson had no part in breaking the store, and taking the property therefrom, yet if he knew it was to be done by Lockwood and Lee, or either of them, and the goods were immediately taken to his house, and he aided by furnishing a box to secrete the goods, and directing where they should be placed to avoid discovery, and prevent the owners from finding them, so as to convert them to his use, then he was guilty of larceny, and could be convicted for that offense under the indictment. To this the prisoners' counsel also excepted.

The counsel for Wixson and Lee then asked the court to charge that the evidence to corroborate the testimony of the

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witness Lockwood must be as to some facts which connected Wixson with the commission of the offense charged, or which connected Wixson with Lockwood in the commission of the offense. The court refused so to charge, to which the counsel for Wixson and Lee also excepted.

The jury found Wixson guilty of petit larceny, and Lee not guilty. Wixson was then sentenced to imprisonment in the State prison for the term of five years.

Whereupon the record was removed to this court by writ of error.

D. Rumsey, for plaintiff in error.

I. The court erred in allowing the prisoner, Lester Lockwood to be sworn as a witness, because, 1. Before he could be sworn, it was necessary the district attorney should, on motion, ask and obtain leave to swear him as a witness. (1 *Phillips' Ev.*, 39; *Cowen & Hill's Notes*, part 1, p. 68, n. 71; *People v. Whipple*, 9 *Cow. R.*, 707, 711.) 2. Lockwood, being jointly indicted with Wixson and Lee, and the indictment still pending, was not a competent witness for or against his co-defendants. He is a party to the record, and before the Code, could never be a witness. (2 *Cowen & Hill's Notes*, p. 135, note 122.) The rule has never been changed in criminal cases. (1 *Arch. Cr. P. & P.*, 154, note; *Rex v. Rowland, Ry. & Mood.*, *N. P. R.*, 471; 21 *Eng. C. L. R. and note*; 3 *Cowen & Hill's Notes*, 1510, n. 72.)

II. Lockwood's wife was improperly admitted as a witness. If Lockwood was not competent, his wife was not. (2 *Starkie Ev.*, part 4, 708.)

III. The court erred in charging the jury that they had the right to convict on the testimony of the accomplice alone, if they were satisfied he had testified to the exact truth.

It has come to be a settled rule of law that corroboration of the evidence of an accomplice is necessary to warrant a conviction. The jury have no right to be satisfied with less. See authorities to next point.

IV. The court erred in charging the jury that it was enough

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if the accomplice was corroborated as to some of the material facts connected with the commission of the crime, and that it was not necessary to furnish any corroborating evidence connecting the prisoner with the commission of the offense charged in the indictment. (1 *Arch Cr. P. & P.*, 154, 1; *Rex v. Webb*, 6 *Car. & Payne*, 595; 25 *Com. L. R.*, 556; *Rex v. Addis*, *Id.*, 388; *Id.*, 452; *Rex v. Wilkes*, 7 *Id.*, 272; 32 *C. L. R.*, 507; *People v. Davis*, 21 *Wend. R.*, 309, 313, 314.)

V. The court erred in charging the jury that although Wixson had no part in breaking the store and taking the property therefrom, yet if he knew it was to be done by Lockwood and Lee, or either of them, and the goods were immediately taken to his house, and he aided, &c., then he was guilty of larceny. (*Wharton's Am. Cr. Law*, 4th ed., § 1811; *State v. Harden*, 2 *Dev. & Bat.*, 407, and this is cited as good law in 2 *Arch. C. P. & P.*, 379, 2, note 3; 1 *Russell on Crimes*, 8th Am. ed., 26, 27.)

He is at most a receiver of stolen goods, and must be indicted as such under the statute, or

He is an accessory, and must be indicted and tried as such, which cannot be done until after principal is convicted. (*Bacon v. People*, 1 *Park. Cr. R.*, 249.)

VI. The court erred in refusing to charge as requested by defendant's counsel. See authorities under fourth point.

The conviction is simply petit larceny. The judgment is five years' imprisonment in State prison.

C. J. McDowell (District Attorney), for the defendants in error.

I. Lester Lockwood was a competent witness against his accomplices, and was properly sworn as such.

1. The proceedings constitute a request by the district attorney, that he be sworn, and the granting of that request by the court. The court exercised its *discretion* at the instance of the district attorney.

2. Accomplices have always been held competent witnesses for the People, but not for their co-defendants, and this, whether

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they were parties to the record or not. (*Cowen & Hill's Notes*, part II, p. 1504, No. 57, 71; *Barb. Cr. L.*, 2d ed., 424, and cases there cited; *Am. Cr. L.*, 4th ed., § 788, and cases there cited.)

3. While accomplices have been sworn for the People from the earliest periods of criminal jurisprudence, I find no case holding an accomplice incompetent by reason of his being a party to the record until the case of *People v. Donnelly* (2 *Park. Cr. R.*, 182).

Mr. Justice CLERKE cites no authority whatever for this decision, while he admits that an accomplice separately indicted is competent, and that there is no good reason for the distinction.

If there is no *reason* for the distinction, some authority ought to be cited for the *distinction* itself.

Neither being a party to the record, nor interest, nor anything else, has rendered a witness incompetent *for the State*, when the public exigencies, to be determined by the court and public prosecutor, require him to be sworn.

"The evidence of accomplices has, at all times, been admitted, either from a principle of public policy, or from judicial necessity, or from both." (*People v. Whipple*, 9 *Cow. R.*, 707.)

II. The competency of the wife of Lockwood follows, as a matter of course, from his competency. Besides, on general principles, she is only excluded in those cases (as conspiracy, for example) where the conviction of the defendant necessarily requires the conviction of her husband.

III. The rule is well established that juries may convict on the uncorroborated evidence of an accomplice; and while it is generally discreet that courts should *advise* that the accomplice be corroborated in some essential particulars, it is not a legal necessity nor even a legal requirement. (*Am. Cr. L.*, 4th ed., § 784, *et seq.*; *Cowen & Hill's Notes*, part 2, 1504, *et seq.*; *People v. Costello*, 1 *Denio R.*, 88.)

IV. The last part of the charge is not explicit, but applicable to this case, and no error can be predicated upon it.

1. To become a principal in larceny as well as any other

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crime, a man must be actually or *constructively* present at its commission. (*Am. Cr. L.*, 4th ed., § 1811.)

2. But there is nothing in this case which precludes such presence. He did not assist in the breaking, nor in the *immediate* taking of the property from the store; but, for aught we know, he was in such proximity as to give alarm, or ward off danger, or assist the thief in carrying off his plunder.

The case does not pretend to give all the evidence, and we are, therefore, bound to presume the constructive presence of the defendant.

3. The law does not prescribe the limit, as to nearness or remoteness, which makes a man a principal. The only requisites are, there must be a plan, and an ability to aid and give courage and confidence to the operative thief in executing the plan.

4. But as the above remarks apply to the burglary as well as to the larceny, it is fair to infer that the court intended its remarks to apply to the third count in the indictment.

Receiving stolen goods is a species of larceny — is properly so denominated — is classed with it in our statutes (2 R. S., 680), and may be included in an indictment for larceny proper.

5. The third count in the indictment will uphold the verdict and sentence, notwithstanding any exception taken in this case.

This court cannot, therefore, disturb either.

V. The amendment of the record obviates the last point of the plaintiff in error.

By the Court, KNOX, J. Although the three defendants, Wixson, Lee and Lockwood, were jointly indicted, the first two were tried separately from Lockwood.

On their trial Lockwood was admitted, under objection, as a witness for the People. This is alleged as error.

In the case of *The People v. Michael Donnelly, impl. with Beals and others* (2 Park. Cr. R., 182), CLERKE, J., says: "It is well settled, and I believe never questioned in this State or England, that when several persons are jointly indicted, one is

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not a competent witness either for or against the others, without first being acquitted or convicted, and it makes no difference whether the defendants plead jointly or separately; an accomplice, however, separately indicted, is competent. Whether there is any good reason for this distinction, it is unnecessary to inquire on the present occasion."

This was a general term decision, and we should feel bound to follow it and reverse the judgment in this case, for it determines the very point raised by the counsel for Wixson, were we not convinced that the decision is erroneous beyond all question.

An examination of the cases will show that the correct rule as to the admissibility of accomplices is this: When the persons indicted are all put on trial together, neither can be a witness for or against the others; but when they are tried separately, though jointly indicted, the People may call those not on trial, though not convicted or acquitted or otherwise discharged, with the permission of the court; but they cannot be called as witnesses for each other, though separately tried, while the indictment is pending against them. If acquitted they may be examined, and even if convicted, unless it be for a crime which disqualifies, and then sentence must have followed the conviction. When all are tried together, if the People desire to swear an accomplice, he must in some way be first discharged from the record.

From this it will be seen that there is no such "distinction" as is mentioned by Justice CLERKE, because an accomplice, separately tried, is in the same condition with reference to his competency as an accomplice separately indicted. Certainly, there can be no "good reason" for any such "distinction." (2 *Russ. on Cr.*, 956, 957; 1 *Greenl. on Ev.*, 506, § 363; p. 524, § 379, and cases in notes; *Barb. Cr. L.*, 2d ed., 425.) The case of *Rez v. Rowland and others*, 1 *Ryan & Moody*, 401; 21 *Eng. Com. Law*, 471; cited by Justice MITCHELL, in his opinion in the case cited from Parker, was where all the defendants were on trial, and hence the necessity, on the part of the prosecution, that the two defendants who

were to be used as witnesses, should be discharged. The indictment was for a conspiracy. The case referred to by the learned justice, in "*Cases Temp. Hardw.*, 163, was when the parties were not separately tried, I conclude; I have not the book at hand; but the case is referred to in Greenleaf, in a connection which authorizes me to say that it is not an authority against the rule which I suppose to be the true one.

The same learned justice says: "Our courts have decided that one defendant in an indictment cannot be a witness for another; it cannot be on the ground of interest, for there is no interest either way; and if it be because he is a party, it applies whether called for the people or his co-defendants."

Undoubtedly, one defendant cannot be a witness for another in the same indictment, unless he have been acquitted, or convicted of an offense which would not disqualify, or in some way discharged from the record; but the reason why the evidence of accomplices has been admitted for the government, rests upon reasons of public policy, or the necessity of the case. (*People v. Whipple*, 9 Cow. R., 707; *People v. Costello*, 1 Denio R., 88; See cases above cited.)

Lockwood was, therefore, properly admitted as a witness. No general application was necessary, although it rests in the discretion of the court, whether an accomplice, already charged with the crime by indictment, shall be admitted.

In this case, the district attorney called Lockwood as a witness. The counsel for the defendants objected "that an accomplice could not be sworn, except by special leave of the court." The court overruled the objection, and allowed the witness to be sworn.

In my judgment, this was tantamount to a formal application for leave to swear the witness, and a determination by the court to accede to the request.

If it was proper to allow Lockwood to be sworn, of course it was no error to admit his wife. She would not have been competent, had her husband been incompetent as an accomplice.

The charge of the judge, that the jury might convict upon the uncorroborated testimony of an accomplice, was clearly right,

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and in accordance with all the cases, which are very numerous. (*The People v. Costello*, 1 *Denio R.*, 88; *The People v. Haskins*, 16 *N. Y. R.*, 844; *The People v. Dyle*, 21 *N. Y. R.*, 578.)

The true rule is briefly but comprehensively stated, in the case from *Denio R.*, just cited, by BEARDSLEY, Justice.

This indictment contains three counts: one for burglary, one for larceny, and one for receiving stolen goods, knowing them to be stolen. The defendant was convicted of *petit larceny*, as appears by the bill of exceptions, and sentenced to the State prison for five years. This judgment—five years in the State prison, for *petit larceny*, which is punishable only by fine, or imprisonment in the county jail, or both—is manifestly improper. As matter of fact, this could hardly have happened; and it is said by the district attorney that the conviction was for grand larceny, and that, by mistake, the clerk entered in the minutes a conviction for *petit larceny*.

If the conviction was really for *petit larceny*, the judgment must of course be reversed, for the reason suggested; and if for grand larceny, the judgment must be set aside for another reason, to wit: an error in the charge, to which I now call attention.

It seems, by the testimony of Lockwood, upon which, mainly, the conviction of Wixson was had, that he and Lee, at the instigation of Wixson, committed the burglary and larceny charged in the first count of the indictment; and that the property then stolen was taken to the house of Wixson, and there concealed, with his assistance and advice. It does not appear that Wixson was present when the burglary, &c., were committed, nor was he so near that it could be said that he was constructively present. Indeed, the evidence is to the effect that Wixson, although he instigated the burglary, &c., and knew when it was to be committed, was himself, at the time, at home and abed. And yet he was convicted of larceny; and the jury were right in so doing, under the charge of the court, which was: "That although Wixson had no part in breaking the store and taking the goods, yet if he knew it was to be done by Lockwood and Lee, or either of

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them, and the goods were immediately taken to his house, and he aided in furnishing a box to secrete the goods, and directing where they should be placed to avoid discovery, and prevent the owner from finding them, so as to convert them to his own use, then he was guilty of larceny."

This charge was clearly erroneous. Under it, Wixson might have been convicted, though he had been a thousand miles from the place where the felony was committed.

That a felony may be committed through the instrumentality of others, though the principal be not present, is well settled, upon the principle; "*qui facit per alium, facit per se*," which is as applicable to criminal as civil cases. But this is where the "other," or agent, is an innocent party. When the person employed is guilty, he is the principal, and his employer but an accessory. (*The People v. Adams*, 3 Denio R., 308; 1 *Russ. on Cr.*, 27.) I speak of crimes which are felonies. In misdemeanors there are no accessories, but all the guilty actors, whether present or absent, are principals. (4 *Denio R.*, 130.)

It is not required that a party should be proved to have been actually, personally present at the commission of a felony, to warrant his conviction as a principal. It is enough that he be constructively present. By this is meant that he must be of the party, and do some act in execution of the common design, or be near enough to the scene of operations, to assist in carrying it out, or to aid those who are immediately engaged in it to escape, should necessity require.

As before observed, the jury, under the charge given, were warranted in convicting Wixson as principal, though they had believed, upon the evidence, that he was neither actually nor constructively present, but miles away from the place where the burglary and larceny were committed.

Why the jury convicted Wixson and acquitted Lee, who was tried with him, I cannot understand.

The testimony against him was certainly as strong as against Wixson.

The fact that he had previously borne a good character did

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not, as against the positive testimony of Lockwood as to his complicity in the burglary and larceny, tend to show that he was innocent. If Lockwood was to be believed, there could be no doubt of Lee's guilt, and his previous good character would then avail him nothing. If the jury put so little reliance on Lockwood's testimony, that proof of Lee's previous good character induced them to reject it wholly as to Lee, how could they convict Wixson on the same testimony?

In my opinion, upon the evidence, Wixson could have been convicted only as an accessory to the felony, or as a receiver of stolen goods.

For the error committed in the charge to the jury, the conviction and judgment must be reversed.

SUPREME COURT. Broome General Term, July, 1861. *Balcom, Campbell and Parker*, Justices.

THE PEOPLE v. EDWARD MURPHY.

Any person may keep an inn, tavern, or hotel, in this State, without having a license to sell strong or spirituous liquors and wines to be drank in his house; and a person keeping an inn, tavern, or hotel, without such license, who sells or gives away any intoxicating liquors or wines on Sunday, or on any day on which an election or town meeting is held, within a quarter of a mile of the place of such election or town meeting, is guilty of a misdemeanor, under the act of April 16, 1857. (*Laws of 1857, ch. 648, § 21; 2 R. S., 5th ed., 944.*)

Where a defendant had been convicted before the Court of Sessions of a misdemeanor for a violation of the excise laws, and exceptions taken by him had been removed into this court, by *certiorari*, and sentence stayed, on affirming the conviction, the proceedings were remitted to the Court of Sessions, with directions to proceed and render judgment, and the defendant was required to appear at the next term of that court to receive sentence.

CERTIORARI to the Tioga Court of Sessions. The prisoner was indicted, tried and convicted in that court for selling intoxicating liquors, as an inn, tavern or hotel keeper, in the town of Owego, on Sunday, in the year 1859, contrary to section 21 of "An act to suppress intemperance and to regulate

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the sale of intoxicating liquors," passed April 16, 1857. (*Laws of 1857, vol. 2, p. 413; 2 R. S., 5th ed., 944.*) The prisoner took exceptions, which were removed into this court by *certiorari*, sentence being stayed. One witness testified that the prisoner was "a hotel keeper" — that he kept up a sign, and had been keeping "such a house" from the spring of 1859 until the time of his trial in December, 1860; that he (the witness) bought whiskey of the prisoner by the drink, and paid him therefor on Sunday, in November and December, 1859; that he saw the prisoner engaged in his public house, tending bar, dealing out liquor, and that he kept a sign up, but the witness did not know how it was worded; that the prisoner kept a house for entertainment of travelers — entertainment for man and beast — that the only way he knew the prisoner was a hotel keeper was from observation and what he saw. Another witness testified that he supposed the prisoner kept a hotel; that he had a bar and a sign, which read, "Murphy's Inn;" that he waited on customers; that people came there to put up as they did at taverns; that the prisoner kept a house of entertainment for man and beast; that he had stabling, hay and grain — a large quantity — five beds, eight stalls; that he kept a bar, and professed to keep a hotel; that he bought liquor, to wit, whiskey by the drink, and paid him for it, on Sunday, in July, 1859, "while he was keeping hotel;" that travelers stopped and staid all night with the prisoner.

There was no certain, and perhaps no legal, evidence that the prisoner had a license to sell intoxicating liquors as an inn, tavern or hotel keeper, in 1859.

The court charged the jury, among other things, "if the evidence in the minds of the jury established the fact that the defendant kept an inn, tavern or hotel, and had sold liquor on the Sabbath, as charged in the indictment, he had violated section 21 of the act, and was guilty of the offense charged, whether the defendant was shown affirmatively to have had a license or not" To which part of the charge the prisoner's counsel excepted.

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D. O. Hancock (District Attorney), for the People.

Charles A. Munger, for the prisoner.

By the Court, BALCOM, P. J. Edwards says, a hotel "is only an elegant kind of common inn." (*Edwards on Bailments*, 401.) The same author remarks, in a note at the bottom of page 402, "Every hotel is an inn, but not every inn is a hotel." At common law, any person may keep an inn for the public accommodation, without a license, as the keeping of it is not a franchise, but a lawful trade open to every citizen. (*The Overseers, &c., v. Warner*, 3 Hill R., 150.) And I am of the opinion any person may keep an inn, tavern or hotel, in this State, without having a license to sell strong or spirituous liquors and wines to be drank in his house. Chapter 97 of the Laws of 1843 (*Laws of 1843*, p. 79) was abrogated in 1857, by the repeal of title nine of chapter 20, part first of the Revised Statutes, entitled, "Of excise, and the regulation of taverns and groceries (*Laws of 1857*, vol. 2, p. 416, sec. 33), and by the repeal of the above mentioned title, the prohibition to erect or put up a sign, indicating that a person keeps a tavern, unless he has a license to sell strong or spirituous liquors or wines, to be drank in his house, was removed; and any person may now erect and keep up a sign indicating that he keeps an inn, tavern or hotel, without having a license of any kind. That kind of business is, therefore, unrestricted, unless the sale of intoxicating liquors is made a part of it.

This case turns upon the question, whether the prisoner could be lawfully convicted of a misdemeanor, for selling intoxicating liquors on Sunday, as a beverage, when he had no license to sell such liquors, as an inn, tavern, or hotel keeper, on other days, granted under and pursuant to the provisions of chapter 628 of the Laws of 1857, entitled, "An act to suppress intemperance and to regulate the sale of intoxicating liquors." (*Laws of 1857*, p. 405, vol. 2.) I think the evidence authorized the jury to find he was an inn, tavern or hotel keeper, when he sold the whiskey as a beverage, mentioned by the witnesses, on Sundays, in 1859. Section 21 of the act

of 1857, declares, that no inn, tavern or hotel keeper, or person licensed to sell liquors, shall sell or give away any intoxicating liquors or wines on Sunday, or upon town meeting or election days, within one-fourth of a mile of the polls, to any person whatever, as a beverage; also, that "whoever shall offend against the provisions of this section shall be guilty of a misdemeanor, and on conviction shall be imprisoned in the county jail, workhouse or penitentiary not more than twenty days." It will be seen that an inn, tavern or hotel keeper, is prohibited from selling or giving away intoxicating liquors or wines on Sunday, *in any quantity* as a beverage. But a person, not an inn, tavern or hotel keeper, can, if he has no license granted under or pursuant to the act of 1857, sell strong or spirituous liquors or wines on Sunday, or on town meeting and election days, at any place, in quantities *more* than five gallons at a time, for any purpose; and he may give away such liquors or wines in less quantities, or by the drink, on any day, or at the place where a town meeting or an election is held. (*Laws of 1857, vol. 2, p. 110, § 13.*)

I think section 21 of the act of 1857 was especially designed to prohibit inn, tavern and hotel keepers, whether licensed or not, from selling or giving away any intoxicating liquors or wines on Sunday, or on town meeting and election days, within one-fourth of a mile of the polls; and if this conclusion be correct, an unlicensed inn, tavern or hotel keeper, who sells or gives away any intoxicating liquors or wines on Sunday, as a beverage, violates that section and commits a misdemeanor. If that section read that no inn, tavern or hotel keeper, or *other* person, licensed to sell liquors, shall sell or give away any intoxicating liquors or wines on Sunday, or on town meeting or election days, &c., as a beverage, the construction put upon it by the prisoner's counsel would be correct; but the word *other* is not in the section, and his construction of it is, therefore, erroneous.

My conclusion is, that the prisoner was guilty of a misdemeanor, and that his conviction should be affirmed, and the indictment and proceedings should be remitted to the Tioga

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Court of Sessions, with directions to proceed and render judgment (2 R. S., 5th ed., 1035, § 27), and the prisoner should be required to appear at the next term of that court to receive sentence. (*Id.*, 1034, § 21.)

Decision accordingly.

SUPREME COURT. Cayuga General Term, June, 1860. *Smith, Johnson and Knox*, Justices.

THE PEOPLE v. JUDSON H. GRAVES.

Form of an indictment for feloniously removing the dead body of a human being from the grave for the purpose of dissection or sale, with a count for feloniously receiving a dead body, knowing it to have been feloniously disinterred.

Where, on the trial of an indictment, the jury bring into court a verdict defective in form, it is competent for the court, before they have separated, to send them out again to consider the case further, and to agree on a verdict in due form, though the informal verdict may have been received and entered in the clerk's minutes, and the jury may have made the usual response, assenting to it when the entry by the clerk was read over to them.

When a verdict, defective in form, is brought in by a jury, it is not erroneous for the court to direct the jury to retire again to say under which count they find the prisoner guilty.

It is not a valid objection to a count in an indictment, that it refers to material matters alleged in a previous count, instead of repeating the allegation.

All that is necessary to the validity of an indictment is, that it enables a defendant to prepare for his defense, and to plead the judgment against him in bar of a second prosecution.

An indictment for feloniously disinterring the body of M. J. B. is not defective, because of an omission to allege that she was "a human being." That fact will be assumed. And where the burial place is described as "a graveyard in the town of Bristol, Ontario county," it was held to be no material defect that the particular graveyard was not designated.

On the trial of such an indictment, when the question of the identity of the body disinterred is submitted to the jury, it is not erroneous for the court to charge that it would be just as good to identify a foot or a hand as the whole person.

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AN indictment was found in the Court of Sessions of Ontario county, of which the following is a copy :

State of New York, Ontario County, ss :

The jurors for the People of the State of New York, and for the body of the county of Ontario, to wit: Jonas M. Wheeler, &c., being sworn and charged to inquire for the People of the said State, and for the body of the county aforesaid, upon their oath, present that John C. Weed, Alanson R. Simmons and Judson H. Graves, late of the town of Bristol, in the county aforesaid, on the 1st day of June, 1858, with force and arms, at the town of Bristol, in the county aforesaid, a graveyard situated in the said town of Bristol, county of Ontario aforesaid, did enter, and the grave therein in which the body of one Martha J. Brockelbank, deceased, had lately before then been interred and then was, with force and arms unlawfully, voluntarily, willfully and indecently, did dig, open and afterward, to wit: on the same day and year aforesaid, with force and arms, at the town of Bristol, in the county aforesaid, the dead body of her, the said Martha J. Brockelbank, out of the grave aforesaid, unlawfully, feloniously and indecently did take and carry away, against the form of the statute in such case made and provided, and against the peace of the People of the State of New York and their dignity.

And the jurors aforesaid, upon their oath aforesaid, do further present that the said John C. Weed, Alanson R. Simmons and Judson H. Graves, on the day and year last aforesaid, and at the town, county and State aforesaid, a graveyard situated in the said town of Bristol and county aforesaid, did enter, and the grave in which the body of one Martha J. Brockelbank, deceased, had lately before then been interred, and then was, with force and arms, unlawfully, voluntarily, willfully, feloniously and indecently, did dig open and afterwards, to wit: on the same day and year aforesaid, with force and arms, at the town of Bristol, in the county and State aforesaid, the dead body of her, the said Martha J. Brockelbank, out of the grave aforesaid, unlawfully, feloniously and

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indecently did take, remove and carry away for the purpose of dissection, against the form of the statute in such case made and provided, and against the peace of the People of the State of New York and their dignity.

And the jurors aforesaid, upon their oath aforesaid, do further present that the said John C. Weed, Alanson R. Simmons and Judson H. Graves, on the day and year aforesaid, at the town, county and State aforesaid, a graveyard situated in the said town of Bristol, county aforesaid, unlawfully did enter, and the grave there, in which the body of one Martha J. Brockelbank, deceased, had lately before then been interred, and then was, with force and arms, unlawfully, voluntarily, willfully, feloniously and indecently did dig open, and afterwards, to wit: on the same day and year aforesaid, with force and arms, at the town and county aforesaid, the dead body of her, the said Martha J. Brockelbank, out of the grave aforesaid, unlawfully, feloniously and indecently did take, remove and carry away, for the purpose of selling the same, against the form of the statute in such case made and provided, and against the peace of the People of the State of New York and their dignity.

And the jurors aforesaid, upon their oath aforesaid, do further present that the said John C. Weed, Alanson R. Simmons and Judson H. Graves, afterward, to wit: on the same day and year last aforesaid, at the town of Bristol, in the county aforesaid, the dead body of one Martha J. Brockelbank, deceased so as aforesaid, unlawfully, feloniously and indecently dug up from the grave aforesaid, and unlawfully and indecently taken and carried away as aforesaid, from the said grave, unlawfully, feloniously and indecently, did receive for the purpose of dissection, they, the said John C. Wood, Alanson R. Simmons and Judson H. Graves, then and there well knowing the said dead body of the said Martha J. Brockelbank, deceased, to have been so as aforesaid, unlawfully, feloniously and indecently dug up, taken and carried away from the grave aforesaid, for the purpose of dissection, against the peace of the People of the State of New York and their dignity, and

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against the form of the statute in such case made and provided.

WM. H. SMITH, *District Attorney.*

The defendants pleaded not guilty.

The trial being moved, they each demanded a separate trial, which was granted by the court, and the district attorney then moved the trial of the defendant, Judson H. Graves.

The trial then proceeded against Graves.

The counsel for the prisoner objected to any evidence being given by the prosecution under the indictment, on the grounds:

1. That the death of said Martha J. is not averred in said indictment.

2. That it is not averred that it was the body of a human being which was removed.

3. That no place of burial is alleged or described.

The objection was overruled by the court, and the defendant's counsel excepted.

The defendant's counsel then moved to quash the said indictment on the same grounds, and particularly the last count, on the ground it did not aver any person from whom the defendant had received the body of said Martha J. Also that it averred the body was disinterred by defendant, so that he could not be a receiver of the same. The motion was denied, and the defendant's counsel excepted.

The counsel for the prisoner objected to any evidence being given as to the place where Martha J. Brockelbank had been buried, on the ground that the place of burial was not described, or attempted to be described, in the indictment, and claimed that the burial place, by its common name, or some other designation, should have been stated. This objection was overruled by the court, and the defendant excepted.

After the proof on the part of the People was closed, the counsel for the prisoner insisted that there could be no conviction upon the evidence under the fourth count, and that the same was insufficient, for the reasons before stated, to uphold a conviction. The court decided that the count was good in law, and that the jury might, under the evidence, if satisfied,

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convict the prisoner under that count; to which decision the prisoner's counsel excepted.

The counsel for the prisoner then demanded that the counsel for the People should elect on which count they would proceed. The court refused to compel an election, and the prisoner excepted.

The counsel for the prisoner then asked that the district attorney be compelled to elect whether he would rely for a conviction upon the counts for opening the grave and removing the body, or under the last count, for receiving the body. This was also refused by the court, and an exception taken.

The court charged, that on the question of identity, it would be just as good to identify a foot or a hand as the whole person; that identification of the whole body was not necessary. To this the prisoner's counsel also excepted.

After the cause was submitted to the jury, they retired for consultation, and afterward returned to court and rendered the following verdict: "We find the prisoner guilty of receiving and dissecting." The verdict was received, and entered by the clerk in his minutes, and read over to the jury, who made the usual response, assenting thereto.

Thereupon, and before the jury had separated, the district attorney suggested that the verdict was informal, and there might be difficulty in enforcing it.

The court thereupon first directed the clerk to change the form of the verdict to that of guilty under the fourth count. To this the counsel for the prisoner objected; but the clerk, under the direction of the court, entered, below the first verdict, a verdict of guilty under the fourth count; to which the counsel for the prisoner then and there excepted.

The counsel for the prisoner asked the jury to be polled, and upon such polling they disagreed, and asked for further instruction from the court.

The court, upon further consideration, directed the jury to retire again for consultation, and to state, by their verdict, under which count they convicted the defendant. To this the counsel for the defendant excepted.

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The jury again retired, and afterward returned with a verdict of guilty under the fourth count.

A bill of exceptions having been made, judgment was stayed, and the proceedings removed into this court by *certiorari*.

J. C. Smith, for the defendant.

Wm. H. Smith (District Attorney), for the People.

By the Court, KNOX, J. At the Ontario November Term of the Court of Sessions, 1859, the defendant was convicted of the crime of unlawfully receiving the dead body of a human being, for the purpose of dissection, knowing the same to have been unlawfully disinterred. (2 *R. S.*, 871, *sec.* 13, 14, 5th ed.) Judgment was suspended on the conviction, until the decision of this court upon the questions raised.

The first question relates to the manner in which the verdict was received and entered. After the cause was submitted, the jury retired for consultation, and returned the following verdict: "We find the prisoner guilty of receiving and dissecting," which was entered by the clerk. Upon a suggestion of the district attorney, and before the jury had separated, that the verdict was informal, the court directed the clerk to change the form of the verdict to that of guilty under the fourth count. This was done. The jury were then polled and disagreed. They then retired again, under the direction of the court, to decide under which count in the indictment they convicted the defendant. They returned with a verdict of "guilty under the fourth count."

It needs no authorities to show that the verdict, which finds a person guilty of an offense, must be that of the jury empaneled for his trial. The very phrase "verdict of the jury" implies this, and hence the judge who presides at the trial has no right to dictate to the jury what verdict they shall render. But I apprehend that he may instruct, and that it is his duty to instruct the jury, as to the *form* of their verdict. What that verdict shall be, is a matter of substance exclusively for

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them. What its *form* shall be, is a matter of convenience merely, which the court may regulate, where the statute has not done so. Although there are some expressions in the books, from which it might be inferred that, after a jury had come into court with a verdict, and the clerk had entered it, it could not be changed in form or substance; yet the true rule is, that until the verdict is rendered and recorded, and the jury have separated so far as no longer to constitute a jury, they have the right to modify the verdict that they may have given, and declare the truth according to their judgment. That only is their verdict which, while they are a jury, is their final and definitive agreement. (*Blackdy v. Sheldon*, 7 *Johns. R.*, 38.)

There was no error committed by the court in directing the jury, whose verdict was merely informal, to retire and say under which count of the indictment they found the defendant guilty.

The next question is, was the indictment sufficient? As the defendant was convicted under the fourth count, it will be sufficient to inquire as to the sufficiency of that only. It alleges that John C. Weed, Alexander R. Simmons and Judson H. Graves, did feloniously and for the purposes of dissection, receive the dead body of one Martha J. Brockelbank, so as aforesaid unlawfully, feloniously and indecently dug up from the grave aforesaid, and unlawfully and indecently taken and carried away from the said grave, the said defendant well knowing the said dead body of the said Martha J. Brockelbank, deceased, to have been so as aforesaid dug up, &c., for the purposes of dissection, &c.

It is said that there are not sufficient averments to constitute the offense, except by reference to the other counts. In other words, that there is no averment of a removal of the dead body from the grave.

It is the constant practice in criminal pleading, in one count of an indictment to refer to matters in a previous count, and it has been decided that this is proper, and that where the first count of an indictment is bad, a subsequent count may

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be sustained, even though it refer to the first count for some allegations, and without repeating them. (*Wharton Cr. L.*, 154, and case cited.)

"Although every count," says Chitty, "should appear on the face of it to charge the defendant with a distinct offense, yet one count may refer to matter in any other count so as to avoid unnecessary repetition." (1 *Chitty Cr. L.*, 250; 2 *H. Black.*, 131.)

If there be doubt as to the fourth count without the reference, there can be none with it. It informs the defendant of the grounds of the charge against him; it states facts sufficient to enable the court to see that an indictable offense is alleged; it enables the defendant to prepare for his defense and to plead the judgment against him in bar of a second prosecution. This is all that is requisite to the validity of an indictment. That it does not allege, in so many words, that the body of "Martha J. Brockelbank" was that of a "human being," is true. But I apprehend that we are bound to assume that "Martha J. Brockelbank" was not only a human being, but a person of the female sex. The name is sufficiently indicative of both. As to the objection that the indictment does not contain a description of the place of burial, the answer is that it does. It says a "graveyard in the town of Bristol, Ontario county." If the objection be that the particular graveyard is not designated, the answer is, that this would be necessary if the statute made it an offense to disinter, &c., or receive the body disinterred from some particular yard; but the offense consists in receiving a body removed from the grave or other place of interment. The sanctity of no particular place of burial is guarded by the statute, but that of all places. The specification of the place of burial was sufficient for all purposes of defense. It was not necessary to allege or prove from whom the body was received. The fact to be proved was that the defendant received it. Here the indictment alleged that three persons, of whom the defendant was one, removed the body from the grave, and the count upon which the defendant was convicted charged them with having received

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it. I see no inconsistency. They could have removed the body from the grave and received it afterward for dissection. This disposes of the questions made upon the indictment.

There was nothing in the charge of the judge calculated to prejudice the defendant. Whether the body found was the body of Martha J. Brockelbank, raised a question of identity, and, upon that question, it was a proper remark of the court that "it would be just as good to identify a foot or a hand as the whole person. In the celebrated case of Webster, the identity of Parkman, the deceased, was proved by his teeth, quite conclusively.

I do not see that any substantial errors were committed on the trial, and cannot say that the jury were not justified in their verdict by the evidence.

Conviction affirmed, and proceedings remitted to Sessions to pronounce judgment.

SUPERIOR COURT OF BUFFALO. March General Term, 1860.
Clinton, Verplank and Masten, Justices.

THE PEOPLE v. JAMES SULLY.

Form of an indictment for obtaining the signature to a check, money, contracts and other valuable things by false pretenses.

On the trial of an indictment for obtaining property by false pretenses, it is competent to prove by the prosecutor, called as a witness in behalf of the People, that, in the transaction in question, he relied on the representations of the prisoner.

And where, on the trial of an indictment for obtaining property from C. by false pretenses, the representation made by the prisoner to C. was that there were no liens on the land except the mortgage then sold by the prisoner to C., while in fact there was a prior mortgage upon it, executed a few days before by M. to L., held that it was competent to prove that, at the time of the execution of the prior mortgage, M. told L., in the presence of the prisoner, that he, L., need not be in a hurry to get his mortgage recorded, on the ground that such testimony, in connection with other acts proved, tended to show a conspiracy

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with M., and an intent on the part of the prisoner to cheat and defraud when he subsequently made the false representation to C.

It is an offense within the statute against false pretenses to effect a sale of a mortgage on real estate by falsely, willfully and designedly representing and pretending, with intent to cheat and defraud, that it is the first lien on the mortgaged premises, and thereby obtain money or other valuable things from the purchaser.

The statutory offense is complete when a person is induced to put his signature to a written instrument, or to part with his property, by a false pretense or representation as to an existing fact, willfully and designedly made for the purpose of obtaining such signature or property, with the intent to cheat and defraud him; and it is not necessary that the pretense or representation should be such that common prudence or ordinary care could have guarded against it, or that it should be accompanied by an "artful contrivance." It is sufficient if it be such that, if true, it would naturally, and according to the motives which influence an honest mind, lead directly to the result alleged.

It is sufficient if the pretense be proved in substance and effect. The precise words need not be used, and the pretense may be proved by the conduct and acts of the prisoner in connection with his statements.

It is not material to the question of jurisdiction of the court where the pretenses were made. The obtaining of the signature or property by means of them, with intent to cheat and defraud, completes the crime and determines the place of trial.

It is not essential, to convict under the statute, that actual loss or injury should be sustained.

JAMES SULLY was indicted at the Erie Oyer and Terminer for feloniously obtaining property by false pretenses. The indictment was as follows:

State of New York, County of Erie, ss:

The jurors of the People of the State of New York, in and for the county of Erie, upon their oath present: That James Sully, on the twenty-third day of June, in the year one thousand eight hundred and fifty-nine, at the city of Buffalo, aforesaid, feloniously devising and intending by unlawful ways and means to obtain and get into his possession the chattels, valuable things and personal property of one Trumbull Carey, and with intent feloniously to cheat and defraud the said Trumbull Carey, did then and there feloniously, knowingly and designedly, falsely pretend and represent to the said Trumbull Carey that a certain mortgage, hereinafter described, was a good and valid mortgage; that it was the only mort-

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gage, lien or incumbrance of any kind upon the premises therein described; that there was no other mortgage, lien or incumbrance upon the premises described therein; that it was the first and only mortgage, lien or incumbrance upon the premises therein described, and was given for a part of the purchase-money of said premises, which said mortgage was dated the second day of June, in the year last aforesaid, and was executed by Enestus T. Cross, and Margaret Cross, his wife, of Alden, Erie county, to William M. Moulton of the same place, to secure the payment of the sum of four thousand and three hundred dollars, upon premises described therein as follows: "All that certain piece or parcel of land situate in the town of Darien, Genesee county, and State of New York, being part of lot number twenty-eight, in said town, bounded as follows, viz: Beginning at the southeast corner of said lot number twenty-eight, thence due west on the State road thirty chains and seventy-four links to John Van Ornam's east line, thence north fifty-eight chains eighty-nine links to lot number twenty-nine, thence east on the line of said lot thirty chains and seventy-four links, thence south on the east line of said lot number twenty-eight fifty-eight chains and eighty-nine links to the place of beginning, containing one hundred and eighty-six acres of land," and which said mortgage was recorded in the clerk's office of Genesee county, on the second day of June, in the year last aforesaid, in book number fifty-one of mortgages, on page two hundred and seventy-three. And the said Trumbull Carey then and there believing the said false pretenses and representations so made, as aforesaid, by the said James Sully, and being deceived thereby, was then and there induced by reason of the false pretenses and representations so made as aforesaid, to purchase the said mortgage, and the bond accompanying the same, executed by said Cross to said Moulton, bearing the same date, and for the payment of the same sum, and to give and deliver in payment therefor to said James Sully among other things his, said Carey's check, in writing, upon the Bank of Genesee, for two thousand dollars, and his contract in

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writing for the payment of the sum of one thousand dollars, and his other contract in writing, for the payment of the sum of four hundred and forty dollars; and the said Trumbull Carey did then and there deliver to the said James Sully, being induced by and by reason of the false pretenses and representations so made as aforesaid, two thousand dollars in money, one thousand promissory notes, commonly called bank bills, made and issued by divers banks for the payment of divers different sums of money, amounting to and of the value of two thousand dollars (a more particular description of said bills are to the jurors aforesaid unknown), his written check for the payment of the sum of two thousand dollars, his contract in writing for the payment of one thousand dollars, and his other contract in writing for the payment of the sum of four hundred and forty dollars, which said check and contracts are in words and figures following, to wit:

\$2,000.

"BUFFALO, June 23, 1859.

Bank of Genesee: Pay to the order of James Sully two thousand dollars, and charge to my account.

(Signed)

T. CAREY."

\$1,000.

"BUFFALO, June 23, 1859.

In consideration of William M. Moulton's assignment to me of a mortgage against Enestus T. Cross, dated June 2d, 1859, of \$4,300, I hereby agree to pay to said Moulton, or bearer, one thousand dollars and interest from date, when said amount has been paid in to me on said mortgage.

(Signed)

T. CAREY."

\$440.

"BUFFALO, June 23, 1859.

In consideration of William M. Moulton's assignment to me of a mortgage against Enestus T. Cross, dated June 2d, 1859, for \$4,300, I hereby agree to pay said Moulton, or bearer, the sum of four hundred and forty dollars, when a certain mortgage given by Sely Kidder to Tisdal & Chatfield, in 1825, and recorded in Liber 6 of Mortgages, at page 19, in Genesee County Clerk's Office, is discharged.

(Signed)

T. CAREY."

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That said two thousand dollars in money, and said one thousand bank bills and said check, and said two contracts, and each and all of them, were then and there of the valuable things and personal property of said Trumbull Carey, and the said money and bank bills were of the value of two thousand dollars, and one of the said contracts was of the value of one thousand dollars, and the other of the value of four hundred and forty dollars, and the said check was of the value of two thousand dollars; that said Trumbull Carey was obliged to, and did afterwards, on the 24th day of June in the year last aforesaid, pay to said James Sully the sum of two thousand dollars in money on said check, and the said James Sully did then and there feloniously, knowingly and designedly, receive and obtain the aforesaid money, bank bills, check and two contracts of the valuable things and personal property of the said Trumbull Carey, by reason and means of the false pretenses and representations aforesaid, and with intent feloniously to cheat and defraud the said Trumbull Cary of the same; whereas, in fact and in truth, the said *mortgage was not then and there a good and valid mortgage*, but was utterly invalid and worthless; and, whereas, in truth and fact, said mortgage was not a *first mortgage and lien* upon the premises described therein; and, whereas, in fact and truth, said mortgage was not the only incumbrance on the said premises, but, on the contrary, there was then and there a mortgage on said premises to secure the payment of the sum of five thousand two hundred and fifty dollars, dated May the 6th, in the year last aforesaid, executed by said William M. Moulton to one Truman Luce, and was the *first and prior lien and incumbrance* on said premises, and the said James Sully then and there well knew that the said last mentioned mortgage was upon said premises, and that the same was the *first and prior lien and incumbrance thereon at the time* of his making the pretenses and representations aforesaid; and, whereas, in fact and truth, each and every of the pretenses and representations aforesaid, so made as aforesaid by said James Sully, were utterly false and untrue, and the said James Sully well knew that each and

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every of the pretenses and representations, so made by him as aforesaid, were utterly false and untrue at the time of making the same, against the peace of the People of the State of New York and their dignity.

And the jurors aforesaid, on their oaths aforesaid, present, that James Sully, on the 23d day of June, in the year one thousand eight hundred and fifty-nine, at the city of Buffalo, in the county aforesaid, feloniously devising and intending, by unlawful ways and means, to obtain the signature of one Trumbull Carey to a certain written instrument, to wit: to a written instrument commonly called a bank check, which was and is in the words and figures following, to wit:

\$2,000.

"BUFFALO, *June 23d*, 1859.

BANK OF GENESEE: Pay to the order of James Sully two thousand dollars, and charge to my account."

Did then and there feloniously, unlawfully, knowingly and designedly, falsely pretend and represent to the said Trumbull Carey that a certain mortgage, hereinbefore particularly described and set forth in the first count of this indictment, was the only mortgage, lien or incumbrance of any kind upon the premises in said mortgage described; that there was no other mortgage, lien or incumbrance upon the premises therein described; that it was a first and only mortgage, lien or incumbrance upon the premises therein described, and was a *bona fide* mortgage, and given for a part of the purchase-money of said premises, and which said mortgage was executed by Enestus T. Cross and Margaret Cross, his wife, to William M. Moulton, and bears date June the second, in the year last aforesaid, and is to secure the payment of the sum of four thousand and three hundred dollars, and which said mortgage, and the premises described therein, are hereinbefore, in the first count of this indictment, particularly described and set forth; and the said Trumbull Carey, then and there believing the said false pretenses and representations so made as aforesaid by the said James Sully, and then and there believing the same, and being deceived thereby, was then and there induced, by reason of the false pretenses and representations aforesaid, so made as afore-

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said, to purchase the mortgage aforesaid, and the bond accompanying the same, and to affix and write his name and signature to the aforesaid written instrument, commonly called a bank check, to wit, in the words and letters following: "T. Carey," which said check, with the signature of said Trumbull Carey thereon, obtained as aforesaid, the said James Sully took and obtained from said Carey, in part payment of the purchase-money for said mortgage and bond purchased as aforesaid; and the said James Sully did then and there feloniously, knowingly and designedly obtain the signature aforesaid of the said Trumbull Carey to the aforesaid written instrument, commonly called a bank check, by reason of the false pretenses and representations aforesaid, and with intent feloniously to cheat and defraud the said Trumbull Carey.

Whereas in fact, and in truth, said mortgage was not then and there the only mortgage, lien or incumbrance upon the premises therein described, and whereas in fact, and in truth, said mortgage was not then and there the first and only mortgage, lien or incumbrance upon the premises therein described, and was not a *bona fide* mortgage, given for part of the purchase-money, but, on the contrary, said mortgage was given without any consideration whatsoever, and was then and there wholly worthless, and there was then and there another mortgage upon said premises to secure the payment of the sum of five thousand two hundred and fifty dollars, dated the sixth day of May, in the year last aforesaid, executed and delivered by one William M. Moulton to one Truman Luce, and which mortgage was then and there the first mortgage upon the aforesaid premises, and was the first and prior lien and incumbrance thereon, and the said James Sully then and there well knew, at the time of his making the false pretenses and representations aforesaid, that the said last mentioned mortgage was upon the said premises, and was the first mortgage, lien and incumbrance thereon; and whereas in fact, and in truth, each and every of the pretenses and representations so made as aforesaid by the said James Sully were utterly false and untrue, and the said James Sully well knew that each and every of the pretenses

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and representations so made by him as aforesaid, were utterly false and untrue, at the time of making the same, contrary to the form of the statute in such case made and provided, and against the peace of the People of the State of New York and their dignity.

J. M. HUMPHREY, *District Attorney.*

The defendant pleaded not guilty, and the issue was tried at a criminal term of the Superior Court of Buffalo, in February, 1860, the indictment having been sent to that court for trial by the Court of Oyer and Terminer.

On the trial, *Trumbull Carey* was called as a witness on the part of the People, and testified as follows: I live at Batavia, and have for 54 or 55 years; I know the prisoner; I became acquainted with him about a year ago, in the cars; he told me what his business was, an agency; I know the Kidder farm in Genesee county by reputation; I had negotiations with prisoner touching the purchase of a mortgage on that farm the fore part of last June; he called at my house at Batavia, and said he had a mortgage to sell; he had it with him (mortgage was shown to witness); this is the one; he also had a clerk's search with him (it is here shown to witness); this is it; that which is below the signature of the clerk was not then upon it; this is the bond accompanying the mortgage; he said it was a good mortgage, upon a farm in Darien, of 186 acres, which was free from incumbrances, except this mortgage; that there were no other incumbrances upon it but this mortgage; that it was the best kind of mortgage; a first class mortgage; that he came out there because persons in Buffalo did not like to buy mortgages on land in Genesee county; I told him I did not know enough about it to buy it; did not know enough about the premises; he asked what I would give for it if it was all as he said; I told him I would buy it at 20 per cent off; he dwelt upon the character of the mortgage considerably, and stated what I have already sworn to, over and over, in different words; I told him I would not buy it without knowing more of the value of the land; that I must see the land, or send some one

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to see it first; nothing was consummated; the matter was left there, and there was no agreement for any future negotiation; he showed me the bond and mortgage and search; I did not examine them particularly; he took them away; I saw prisoner next about ten days after, at Batavia; he called at my house; I had discovered upon this search a prior mortgage by Kidder to Chatfield and Tisdall, of \$300; I came to Buffalo between the first and second time I saw Sully, and saw Mr. Otto, who offered me the mortgage; I addressed him a note to send me the search; he did so a few days after; I asked Mr. Godfrey to go and appraise the farm; he came to my house, and, upon looking over the search there, we (Godfrey and witness) discovered this little mortgage of Kidder to Chatfield and Tisdall, given in 1825, and I then stopped Godfrey from going out to see the farm; the next day or so, Sully came out; I told him what I was going to do when I discovered this Kidder incumbrance; he asked where Godfrey lived; I told him, and he left, taking the papers with him; the next day Sully and Godfrey came to my house; they had been up to examine the land; Mr. Godfrey appraised the land so low I told Sully it was not sufficient; Sully took the papers and went away; while there he said the Kidder mortgage was paid; I told him, if so he could get it discharged; that Chatfield lived in Chicago; he said he would get a discharge; he showed me a bond of indemnity against that mortgage; it was sent out by Otto, and he mentioned it; prisoner said at this time that the Kidder mortgage was the only incumbrance on the land, and when it was discharged the land would be clear; I told him I should be in Buffalo next day; prisoner took the papers away with him; I came to Buffalo the next day or day after; prisoner called at my son's, Dr. Cary, and said he had come to make the security acceptable, by leaving part of the money; that Moulton was under the necessity of having \$2,600 that day, which he wanted to pay on a contract for a farm, which, if he did not pay, he would lose some \$1,200; I offered to give him \$2,000 down, and a note for \$1,000, payable when that amount should be paid upon the

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Cross mortgage, and \$440 upon the discharge of the Kidder mortgage; he declined to take that; said Moulton wanted more money, and that he could do better; that it was a first class mortgage; I told him, very well, do so; upon reflection he said Moulton wanted the money so much, and that it would not be long before that amount would be got of Cross on his mortgage; I asked prisoner if it was all right; he said it was, and promised if it was not all right, he would make it right; he then made the writings, that is, the notes, and copies of them for me to keep; I drew a check; the assignment he had already made; this is the check; I asked to whom it should be payable, and he said to himself; this is the assignment, dated June 20; it was delivered on that occasion with the bond and mortgage; I never saw Moulton to know him until after the transaction; the assignment was acknowledged, and had the clerk's certificate upon it; I noticed the assignment bore date prior; prisoner said he had the assignment all drawn; I next saw my check at the Bank of Genesee, Batavia; I had money there, but not the amount of the check.

Question by district attorney: Did you rely upon the representations of the prisoner touching the Cross mortgage? Objected to, on the ground that it called for the secret mental emotions of the witness. Objection overruled. Prisoner's counsel excepted. *Ans.* I did. Prisoner also gave me the search at this time.

After a further examination,

Truman Luce was sworn on the part of the People, and testified: I will be seventy-two in March; I live in Lancaster, and have since 1810; I know the Kidder farm in Darien, Genesee county; I bought it of Kidder; I have seen prisoner frequently; I knew Moulton; I made his acquaintance about the first of May last; I had a negotiation for the sale of this farm to Moulton; I had made a contract with Harrington for it, and I told Moulton if he would perform that contract I would sell it to him; prisoner called upon me about the farm, and before I had any talk with Moulton about it, I told him I was under a written contract with Harrington, and he said he

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could arrange it with Harrington; I think Sully called with Moulton; I made a deed to Moulton; it was at my house; Sully was there, my son-in-law and my wife; I had been hurt very bad and could not go out; Moulton came in the afternoon, and Sully came in the cars about 5 or 6 P. M.; prisoner said he came to make out the papers, and had blanks with him; I told Sully I could not give the deed; Sully drew the deed from me to Moulton, and a bond and mortgage to me from Moulton; Mr. Moulton went and got Mr. Grimes, the justice of the peace, to come and take the acknowledgement of the deed and mortgage; he took the acknowledgements; the deed and the bond and mortgage were delivered there in the presence of Sully.

The district attorney here offered to prove that upon this occasion, in the presence of prisoner, Moulton told the witness, Luce, that he, Luce, need not be in a hurry to get his mortgage recorded; that in the course of a week Moulton would call upon Luce, and they would go together to the clerk's office and have the deed and mortgage recorded. The counsel for the prisoner objected to the admission of the evidence as immaterial and irrelevant. The court overruled the objection, and the prisoner excepted.

Moulton said he bought the farm for himself, and did not intend to sell it; that in the course of next week he would come and go with me to the clerk's office, at Buffalo, and get the clerk's certificate to the deed and mortgage, and we could go out to Batavia together and have them recorded; my son was on the farm, and Moulton said he wanted the deed to show to him, so that he would go off the farm; that he would bring it back, and we could go together and get the certificate and have it recorded; he said, you may take my deed and get it recorded; I said I was not able to go, and I was not; Sully was present; Moulton was to give me \$30 an acre. The balance above the mortgage was arranged there; Sully said he was afraid the cars had left him; Moulton said if they had he would take him to Buffalo in his wagon; it was about ten o'clock when they left; the money paid was paid by Sully;

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Moulton gave me his note for \$81.50, and Sully indorsed it. (The bond and mortgage were here shown witness.) This is the bond and mortgage given to me; they were executed on the first day of June, but were dated back to the date of the contract; the next Monday after the first of June I came to Buffalo, and saw prisoner on the train, and afterwards at his office; I saw Moulton at Sully's office.

Further evidence was given, both for the prosecution and the defense.

After the evidence was closed the judge charged the jury as follows :

On the first day of June, 1859, Truman Luce conveyed the Kidder farm to William M. Moulton, and at the same time Moulton executed and delivered to Luce his bond and mortgage upon the farm, to secure the payment of \$5,250, being nearly the whole of the purchase-money. The deed of that farm from Luce to Moulton was recorded on the second day of June. The mortgage from Moulton to Luce was recorded on the tenth day of June. On the second day of June, Moulton executed to Cross a deed of the Kidder farm, and Cross at the same time executed his bond to Moulton and a mortgage on that farm to secure the payment of \$4,300, and which last mentioned deed and mortgage were recorded on the second day of June. On the 23d day of June, Carey purchased the Cross bond and mortgage. The sale of them to him was negotiated by the prisoner. On the twenty-third day of June, at the city of Buffalo, prisoner delivered to Carey an assignment of them, and received from Carey his check of \$2,000 on the Bank of Genesee; and on the same day the prisoner drew the money from that bank at Batavia, in the county of Genesee, upon this check. The assignment of the bond and mortgage to Carey was recorded on the 28th of June. The prisoner drew up all the said deeds, bonds and mortgages, and was present at the delivery, on the 1st of June, of the mortgage of Moulton to Luce, and knew of its existence. All these facts are not only established by the evidence, but are conceded by the counsel for the prisoner. The mort-

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gage from Moulton to Luce is, and ever has been, a prior lien upon the Kidder farm over the mortgage from Cross to Moulton. The prisoner cannot be convicted under the first count in the indictment, because the money was not obtained upon the check within the jurisdiction of this court. The agreement to pay one thousand dollars when it was received from the Cross mortgage is not within the statute. The only offense of which the prisoner can be convicted is under the second count, of obtaining the signature of Trumbull Carey to the check for \$2,000 upon the Bank of Genesee.

Under the proofs which have been adduced before you, the material disputed questions of fact to be determined by you are:

1st. Did the prisoner, during the negotiation of the sale to Carey of the bond and mortgage made by Cross to Moulton, represent to Carey that that mortgage was the only mortgage, lien or incumbrance upon the Kidder farm, or that there was no other mortgage, lien or incumbrance thereon? If you shall find that he did so represent, I charge you that, under the circumstances of this case, such a representation is a pretense within our statute. To the portion of the charge "that under the circumstances of this case, such a representation is a pretense within our statute," the counsel for the prisoner excepted.

2d. Did Cary rely upon the representation? It is not necessary that he should have relied upon it solely. But you must be satisfied that it was a moving cause, and without which he would not have made the purchase of the bond and mortgage and signed and delivered the check.

3d. Was the representation made with a knowledge that it was false, and with intent to defraud? If you are satisfied that the representation was made with an intent to defraud, then it is well laid in the indictment to be to defraud Carey, for he was the only person who in law could be defrauded.

The counsel for the prisoner thereupon made to the court the following requests to charge:

1st. The jury must be satisfied, before they can convict, that

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the representation proven made by defendant to Carey was one to which "a person of ordinary caution would give credit." The judge refused to charge in this form, having already charged on this point, and the prisoner excepted.

2d. That the jury cannot convict for such representation, if they are satisfied, from the evidence, Carey had the means of detection of the false representation at hand. The judge refused so to charge, upon the ground that there was nothing in the case to call for it. Prisoner excepted.

3d. The jury cannot convict unless they believe the representation alleged to be false was such an ingeniously contrived fraudulent representation that Carey, in the exercise of ordinary prudence, could not guard against it. The court refused so to charge for same reason given as to the first request, and prisoner excepted.

4th. That as to the representation made by the defendant at Batavia, to Carey, at the first interview, the jury cannot take that into consideration if they are satisfied all negotiation was then broken off between prisoner and Carey, and those representations were not referred to and adopted again by prisoner in his subsequent conversations with Carey. The court complied with this request, and so charged.

5th. The jury cannot take into consideration the second representation testified to by Carey, as made by the prisoner at Batavia, it being, in substance, "the only incumbrance upon the land is the Kidder mortgage, and when that is paid off the land will be clear from incumbrance," because no such representations are charged in the indictment. The court refused so to charge. The prisoner excepted.

6th. They cannot take into consideration the representation made by prisoner on the 23d of June to Carey in Buffalo, it being "the mortgage is all right, and if not I will make it right," because no such representations are charged in the indictment. The court said, "this is so, except that you may consider them for the purpose of determining whether the previous conversations were adopted."

7th. The jury cannot take into consideration the represent-

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ations made in Batavia, provided they believe those representations made then produced the payment of the money upon the check, inasmuch as the offense was all complete in Genesee county, and this court have no jurisdiction of the offense. The court charged that the prisoner could not be convicted under the first count, and then refused to charge further, to which refusal prisoner's counsel excepted.

8th. The district attorney having given proof not only of the giving of the check, but of the obtaining of the money thereon in the county of Genesee by prisoner, and the indictment averring the obtaining of the money, the obtaining of Carey's signature to the check cannot be, in this case, regarded as an offense. It is merged in the money realized thereon. The court charged same as in last request, and then refused to charge as herein requested. Prisoner excepted.

9th. The conditional contract to pay when Cross paid, under the proof in this case, is not such a written instrument as is contemplated by the statute. The court so charged, as requested, and also charged that the prisoner could only be convicted of obtaining the signature to the check.

10th. Before the jury can come to the conclusion that Carey has been actually defrauded, by means of any such representation, they must be satisfied by proof; and the burden of proving that fact is on the prosecution, that Carey will not get his money on the bond assigned to him, and on the guaranty of Moulton, when it becomes due. The court refused so to charge, and the prisoner excepted.

11th. That before the jury can convict, they must be satisfied Carey has no valid and good security for the amount of the check and conditional contract signed by him. The court refused so to charge, and the prisoner excepted.

12th. That if the jury are satisfied the meaning of the representations made by prisoner was, there were no other incumbrances on record than is shown by the certificate, then they should acquit him, unless they are satisfied prisoner knew, at the time of making such representations, the Luce mortgage

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was recorded. The court complied with this request, and so charged.

13th. The prisoner's counsel further requested the court to charge that, upon the whole proof, the jury cannot take into consideration the representations first made by prisoner to Carey. The court refused to so charge, having already charged upon this point under prisoner's fourth request. Prisoner excepted.

14th. That the jury cannot take into consideration, as evidence of the pretenses charged in the indictment, the representations testified to by Carey and Godfrey at the time both were present. The court refused to so charge, and the prisoner excepted.

The jury found a verdict of not guilty on the first, and guilty on the second count of the indictment.

The prisoner's counsel moved in arrest of judgment. The court denied the motion.

Whereupon the judgment was suspended, and the proceedings were removed into the general term of this court for review.

Albert Sawin, for the prisoner.

I. The judgment should have been arrested. The verdict is a *felo de se*. No judgment can be given. The jury have found the prisoner not guilty of the offense charged in the first count, and guilty of the offense charged in the second count, both counts charging the same offense, to wit, the obtaining the check.

It is clear that upon the first count the prisoner could have been convicted for obtaining the signature to the check. It was not necessary that he should have obtained all the valuables therein set forth. (1 *Chitty's Pl.*, 356; *Com. Digest*, Tit. Pl. C., 33; *Bac. Abr.*, Title Pleas, 1; *Vin. Abr.*, Title Dec.; *Whar. Cr. L.*, 975; *Id.*, 208; *Campbell v. Rex*, 11 *Ad. & Ell.*, N. S., 100.)

If the second count had averred the pretenses therein set

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forth to be certain *other* false pretenses, then this record difficulty would not exist.

II. The bill of exceptions presents the following points:

First. The complainant testified, under objection and exception, that he relied upon the representations of the prisoner. The jury must determine that from the facts—the circumstances attending the transaction.

Second. The district attorney offered in evidence a conversation that took place in the prisoner's presence, between Luce and Moulton, showing that Moulton desired Luce to postpone the recording of his deed. This was objected to as irrelevant and immaterial. It might show an intent to defraud Luce. For that the prisoner was not indicted; therefore immaterial.

Third. The justice erred in not charging, as requested, "That the representations testified to by Carey and Godfrey, at the time both were present, should not be taken into consideration by the jury *as evidence of the pretenses charged in the indictment.*" The same point is presented by the fifth request.

a. The averments in the indictment of the pretenses (the first count being withdrawn from the consideration of the jury, need not for this purpose be examined), in the second count, are as follows: "That the Cross mortgage was the only mortgage, lien or incumbrance of any kind upon the premises therein described; that it was a first and only mortgage, lien or incumbrance upon the premises therein described, and was a *bona fide* mortgage, and given for a part of the purchase-money of said premises."

b. The pretenses proven were: "Prisoner said at this time that the Kidder mortgage was the only incumbrance on the land, and when it was discharged the land would be clear. Prisoner said, get the Kidder mortgage discharged, and then the property would be free from any other incumbrance. Sully said if that was discharged the title would be perfect, and there would be no incumbrance; and he did not believe that was an incumbrance."

There is a variance in substance between the pretense laid and that proven.

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The pretense averred is; "The land is free from all incumbrances"—an absolute unconditional representation. The pretense proven being, "There is another mortgage, the Kidder, and when that is discharged, the land will be free from all incumbrances." (*Smith v. Brush*, 8 *Johns. R.*, 84; *Laurie v. Kneiss*, 10 *Johns. R.*, 140; *Town v. Winters*, 7 *Cow. R.*, 263; *Stow v. Knowlton*, 3 *W.*, 374; *Emery v. Miller*, 1 *Denio R.*, 208; *Rex v. Phulow*, 1 *Campb. R.*, 494.)

Fourth. The judge erred in charging, in substance (6th request), that the jury might take into consideration the words used by the prisoner to Carey in Buffalo, "it was all right, and promised if it was not all right he would make it all right," as evidence of the reaffirmation and adoption of the representations made at Batavia; for the simple reason (it being conceded no such pretense was in substance averred in the indictment), Carey does not pretend there was any reference to any former conversation between them.

The learned justice virtually charged the jury they might interpret those words as follows: "It is just as I told you, Mr. Carey, in our first interview at Batavia;" when Carey expressly says, he relied upon his promise to make it right if it was not right.

Fifth. The refusal to charge contained in 14th request was erroneous.

Carey says, that in effect he refused to buy the mortgage, and there was no agreement for any future negotiation; and there is no pretense there is any proof of any allusion to the representations then made in the future interviews.

Sixth. In this case all the representations were made in Genesee county. The money, the object of those representations, was obtained there. The prisoner, it will be conceded, can legally be convicted there, and nowhere else, for obtaining the money.

And whatever might be the law of the case, if Carey had not virtually delivered the money to the prisoner in Genesee county, the check being merely used as an authority to the cashier, as agent of Carey, to deliver the money to the pris-

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oner; the money being obtained, the real offense is not the obtaining the signature to the check, and therefore the court should have charged as requested on that point.

Seventh. The important question in the cause is presented by the following exceptions.

1. The prisoner's counsel excepted to the charge, that the representations, *as a matter of law*, were within the statute.

2. The prisoner's counsel requested the court to charge, that upon the proof in the case, they must be satisfied the pretenses were of such a character as would be credited and relied upon by persons of ordinary caution. That element, together with the means of detection, &c., was excluded from the consideration of the jury. The jury were virtually instructed, if a man lies to another and obtains property by such lie—no matter how absurd it, the lie, may be—he is guilty under our statute, provided a reliance is placed upon the lie; and further, the jury were virtually instructed that in determining the question of such reliance, they need not take into consideration the prudence and caution of the complainant, nor the means of detection of the lie. The question in this State is not open; if any question is settled, this one is.

In the cases of *Young v. Rex* (3 T. R., 102); *People v. Johnson* (11 Johns. R., 292); *People v. Haynes* (11 Wend. R., 562), the character of the pretense, whether calculated to impose upon persons of ordinary caution, was recognized as an essential element in the crime.

This was also recognized by Senator TRACY, in *People v. Haynes* (14 Wend. R., 546), and the opinion of the chancellor in that case has never been adopted in any reported case since that time, while that of Senator TRACY has. (*People v. Williams*, 4 Hill R., 9; *People v. Crissie*, 4 Denio R., 529; *People v. Stetson*, 4 Barb. R., 151.)

Eighth. The result of the theory of the judge in his charge and refusals to charge, was virtually to withdraw the essential element of the crime from the jury. They were virtually told, taking the law from the court, if the prisoner opened his mouth and spoke the words set forth in the indictment,

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you will convict him without any reference to the circumstances indicating a want of caution on the part of, or a means of detection at hand by, the complainant.

F. J. Fithian (District Attorney), for the People.

I. It was proper to ask Carey if he relied upon the representations of the prisoner. Although that was a question for the jury, it was nevertheless competent for the witness to give evidence upon it.

II. The exception in the case, to what Moulton said in the presence and hearing of prisoner, is not well taken. It was material evidence on the question of intent.

III. The rulings of the court below, in the charge, and upon the requests to charge, were correct. (*People v. Johnson*, 12 Johns. R., 291; *Same v. Haynes*, 11 Wend. R., 557; *Same v. Same*, 14 Wend. R., 546; *Same v. Williams*, 4 Hill R., 9; *Same v. Sleddens*, 3 Id., 169; *Same v. Crissie*, 4 Denio R., 525; *Same v. Stetson*, 4 Barb. R., 152.)

1st. The court charge, as a matter of law, that the pretenses alleged in the case, if proved, are within the statute. It is correct for the court to pass upon this; for when the facts are proved, whether or not they amount to a pretense within the statute, is necessarily a question of law.

2d. In this case, that the actual state of the title to the "Kidder Farm," and the incumbrances thereon, including the "Luce Mortgage," at the time of the making the alleged false pretenses, was as charged in the indictment, were not controverted on the trial. The only questions really mooted on the trial were, whether the prisoner made the representations charged, and whether Carey relied upon them. That the pretenses were false to prisoner's knowledge (if made), was not denied.

3d. The ruling of the court, that the representations under the disputed facts of this case were (if made) a pretense within the statute, does not necessarily bring up for decision the question in dispute between Senator TRACY and Chancellor WALWORTH in *People v. Haynes*. Because, in this case, the repre-

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sentations are a pretense even within the rule laid down by the Senator. We have here got an "ingenious contrivance," an "unusual artifice," against which common sagacity and ordinary caution is not sufficient to guard.

4th. But it is submitted, that all Senator TRACY, in *People v. Haynes*, meant to decide (even if his opinion should be held to be law), was, that to bring a pretense within the statute, all that is requisite is, that it should be reasonable and probable upon its face, so that a man of ordinary prudence, having confidence in the person making it, would be likely to believe and act upon it. Or, in other words, that the alleged pretense must not be so *absurd and improbable* upon the face of it that no rational man ought to be deceived thereby. If Senator TRACY's opinion goes further than this, it is clearly overruled by the subsequent authorities above cited.

5th. The above disposes of the 1st, 2d and 3d requests to charge.

6th. The court correctly refused to charge, as requested, in the 5th request of defendant's counsel. The *second* representation testified to by Carey is substantially like the first one, and in substance as set forth in the indictment. It was that the "Kidder mortgage" *was paid*, and no incumbrance, and to the same effect is the testimony of Godfrey.

7th. The ruling on defendant's 7th request to charge was correct, as the grounds of the request are not in accordance with the facts.

8th. The 8th request of defendant's counsel was properly refused. The prisoner was not on trial for obtaining the money, but for obtaining the *signature* to the check; and it is no answer to say he afterwards committed another offense in obtaining the money.

9th. The 10th and 11th requests to charge have no foundation in law. It is no answer to a criminal fraud to say that the person defrauded by false statements may, upon some contingency, obtain satisfaction for the property of which he has been defrauded.

10th. The ruling of the court upon the 14th request to

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charge was correct. If the negotiation was not wholly broken off after the first representation, then those representations were a part of the *res gestae*, and proper to be considered by the jury.

11th. It is submitted there is nothing in the 15th request to charge. It is difficult to understand how the force of a representation is broken or destroyed, or made immaterial, because heard by a person other than the one defrauded.

By the Court, MASTEN, J. The prisoner was indicted, tried, and convicted, of obtaining the signature of one Trumbull Carey to a check for \$2,000 upon the Bank of Genesee.

He now moves, under section 35 of the act, relating to this court (*Laws 1857, vol. 1, page 754*), for a new trial, upon the ground that error in law was committed by the court upon the trial.

The indictment contains two counts. The pretenses are laid substantially the same in both counts.

The first count alleges that the prisoner, by means of the false pretenses, obtained Carey's check, in writing, upon the Bank of Genesee, for \$2,000, and also certain other contracts in writing, setting them out at large; also \$2,000 in money, and \$1,000 in bank bills, the valuable things and personal property of said Trumbull Carey, of the value, &c. It does not, in terms or in substance, charge *the obtaining of the signature of Carey to the check*.

The second count charges that the prisoner, by means of the false pretenses, obtained *the signature* of Trumbull Carey to a written instrument commonly called a check, setting it out at large. This count, in brief, charges that the prisoner presented to Carey a mortgage made by one Cross and wife to one Moulton, upon certain lands in Genesee county (which mortgage and lands are particularly described), and induced Carey to purchase the mortgage, and to affix and write his name and signature to the check, by falsely, &c., representing, with the intent to cheat and defraud Carey, that such mortgage "*was the only mortgage, lien or incumbrance of any kind upon*

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the premises in said mortgage described; that there was no other mortgage, lien or incumbrance, upon the premises therein described; that it was a first and only mortgage, lien or incumbrance upon the premises therein described, and was a bona fide mortgage, and given for part of the purchase-money of said premises." It negatives specifically all of the pretenses in the words in which they are laid, and avers that "there was then and there another mortgage upon said premises to secure the payment of \$5,250, dated the sixth day of May, 1859, executed and delivered by one William M. Moulton to one Truman Luce, and which said mortgage was then and there the first mortgage upon the aforesaid premises, and was the first and prior lien and incumbrance thereon. It then alleges that the prisoner knew of the existence, &c., of the mortgage of Moulton to Luce, and that his pretenses were false.

The prisoner was acquitted under the first count, and convicted under the second count.

I will examine the exceptions in the order in which they occur. The district attorney inquired of Carey, the dupe, whether he relied on the representations of the prisoner. This was objected to by the prisoner, on the ground that it called for the secret mental emotions of the witness. The court overruled the objection, and the prisoner excepted.

This was a material fact to be established by the public prosecutor, and certainly no one could speak to it better than Carey. The fact was sought after, and not the opinion of the witness. (*People v. Herrick*, 13 *Wend. R.*, 87.)

The district attorney offered to prove that while at Luce's house, at the time of the conveyance of the farm to Moulton, and the execution of the mortgage for the purchase-money by Moulton to Luce, Moulton, in the presence of the prisoner, told Luce that he need not be in a hurry to get his mortgage recorded; that in the course of a week Moulton would call upon Luce, and they would go together to the clerk's office and have the deed and mortgage recorded. The evidence was objected to as immaterial and irrelevant. This objection was properly overruled. It, in connection with the conduct

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and acts of the prisoner, had an important bearing upon the intent of the prisoner to cheat and defraud, at the time he made the representations to Carey alleged in the indictment. It tended to show not only an intent, but a conspiracy with Moulton to cheat any one they could.

The next exception is to the charge "that under the circumstances of this case such a representation is a pretense within our statute."

This exception presents the question, whether it is an offense within our statute against false pretenses to effect a sale of a mortgage on real estate by falsely, willfully and designedly representing and pretending, with intent to cheat and defraud, that it is the first lien or mortgage upon the mortgaged premises, and thereby obtain money, &c., from the purchaser.

If this be not so, I have entirely failed to understand the statute. I am aware that in construing this statute there is a seeming conflict between some of the cases, at least in their *dicta*. This has chiefly arisen, I think, from not considering whether the case cited was upon an indictment under the statute, or upon one for a cheat at common law.

A cheat or fraud, to be a criminal offense at the common law, must be such a fraud as affects the public, and against which common prudence cannot guard, and must indicate a general intent to defraud.

But the statutory offense of which the prisoner was convicted, is complete when one is induced to put his signature to a written instrument, or to part with his property, by a false pretense or representation as to an existing fact, willfully and designedly made for the purpose of obtaining such signature or property, with the intent to cheat or defraud him; and it is not necessary that the pretense or representation should be such that common prudence or ordinary care could not have guarded against it, or that it should be accompanied by any "artful contrivance," or that the mind of the dupe should be tempted to belief by "an artfully contrived story." It is sufficient if it be such (and such it must be), that, if true, it would naturally, and, according to the motives which in the affairs

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of life influence the honest mind, directly lead to the result alleged. All men are not equally prudent or cautious, and the statute was passed for the protection of the weaker and more credulous and unsuspecting part of mankind. If, therefore, an assertion of the existence of such a fact be falsely, willfully and designedly made to induce another to part with his property with intent to cheat him, and the assertion accomplishes the object for which it was made, the offense under the statute is complete.

Two of the earliest cases reported in this State went upon this distinction. The one was an indictment for a cheat at common law; the other, an indictment under the statute. (*The People v. Babcock*, 7 Johns. R., 201; *The People v. Johnson*, 12 Johns. R., 292.)

In *McQueen v. Wickham* (10 Adol. & Ellis, 34; 37 Eng. Com. Law, 29), Lord DENMAN, in answer to the assertion that the device must be such as to impose upon a man of ordinary caution, said: "I never could see why that should be. Suppose a man has just art enough to impose upon a very simple person and defraud him, how is it to be determined whether the degree of fraud is such as shall amount to a misdemeanor? Who is to give the measure? There are, indeed, cases where the pretense is so very foolish that it is difficult to say that an imposition is practiced; but still, who is to give the measure?"

The plain answer is, that the jury are to give the measure. It is for them to say whether the prosecutor relied upon, was deceived by, and parted with his property upon the strength of the pretenses used. Any other construction of the statute would defeat the very object of its enactment, by leaving the weak and confiding at the mercy of the fraudulent and designing.

In the language of Mr. Greaves, in a note to *Russ. on Cr.* (vol. 2, p. 289), "as in robbery, it would be absurd to lay down any rule which defined the force necessary to constitute a robbery, with reference to the ordinary strength of mankind; so, in false pretenses, it would be equally absurd to establish a rule with reference to the ordinary capacity of mankind."

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The character and nature of the pretenses, and how calculated they were to deceive the prosecutor, the prosecutor's habits and mental capacity are all proper to be considered by the jury in determining whether the prosecutor was deceived by them, and whether they were the operative cause of his parting with his property. An inexperienced youth or a feeble old man might be induced to part with his property by false pretenses, particularly if made by a person in whom he placed mistaken confidence, which would not engage the attention of a man of ordinary sagacity and prudence, and which a sharp and experienced man would see through at a glance. Which stands most in need of the protection of the law? and is not the law made for the weak? Take two men of "common prudence and sagacity," and the one is duped by that which would have obtained no credit from the other, and they each wonder at the credulity of the other.

It was contended, on the argument by the counsel for the prisoner, that the cases of *The People v. Williams* (4 Hill R., 9), and *The People v. Stetson* (4 Barb. R., 151), fully sustain him in his position. Some of the expressions in the opinions delivered in those cases, detached from the case, might seem to do so. Those cases were correctly decided. The prosecutor in each of them was a party to a highly immoral and criminal act, and that is the ground upon which those cases stand.

But I will pursue this discussion no farther, but content myself by declaring my entire concurrence in the construction given to the statute under consideration by Chancellor WALWORTH, in the able opinion delivered by him in *The People v. Haynes* (14 Wend. R., 548).

In order to hold the case at bar to be within the statute, it is not necessary to give to the statute the scope and effect to which I have just declared its true construction entitles it.

We are of the opinion that the pretense laid in the second count of the indictment, and submitted to the jury, is within the statute, and that the exception is not well taken. The judge instructed the jury that the mortgage from Moulton to Luce was, and ever had been, a prior lien upon the Kidder

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farm over the mortgage from Cross to Moulton. He submitted to the jury to determine whether the prisoner, during the negotiation of the sale to Carey of the bond and mortgage made by Cross to Moulton, represented to Carey that that mortgage was the only mortgage, lien or incumbrance upon the Kidder farm, or that there was no other mortgage, lien or incumbrance thereon; whether Carey relied upon and was duped by the representation; whether the representation was made with a knowledge on the part of the prisoner that it was false and with intent to defraud; and instructed them, if they should find all these facts against the prisoner, that, under the circumstances of this case, such representation was a pretense within our statute. The only part of the charge excepted to was, "that, under the circumstances of this case, such a representation is a pretense within our statute."

We are also of the opinion that the exceptions to his refusals to charge as firstly and thirdly requested, are not well taken.

We are also of the opinion that the exception to the refusal to charge as secondly requested is not well taken. There was nothing in the case to call for it. Certainly Carey did not owe to the prisoner the duty to go to the clerk's office and examine the records. Nor did (to use what seems to be a favorite expression) "common prudence" suggest that he should go; for the prisoner, by the search certified by the county clerk, had satisfied "common prudence" that nothing would be found there. There were no means at hand for detecting the false representation. But it seems to me to come with an ill grace from the prisoner, to say, you placed too much reliance upon my statements; if you had spent your time or money in investigating them, you might have discovered that they were false.

The next exception is to the refusal to charge as fifthly requested. The 15th request, also, will be considered here.

I think the jury would have been warranted in finding that the testimony was not in substance as it was assumed to be by the prisoner's counsel in his fifth request.

Carey testified that he had had an interview with the pris-

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oner previous to the one pointed at by the 5th and 15th requests to charge. At the first interview, the prisoner offered to sell him the mortgage of Cross to Moulton, and told him it "was a good mortgage upon a farm in Darien of one hundred and eighty-six acres, which was free from incumbrances, except this (the Cross) mortgage; that there were no other incumbrances upon it but this mortgage; that it was the best kind of mortgage, a first class mortgage." Carey did not examine the county clerk's certified search at that time, but before the next interview with the prisoner he did, and found the Kidder mortgage upon it, and called prisoner's attention to it. Prisoner said "the Kidder mortgage was paid; he would get it discharged, and when it was discharged the land would be clear." It is sufficient if the pretense be proved in substance and in effect. The very words need not be used, and the pretense may be proved by the conduct and acts of the prisoner, in connection with his statements.

The jury would have been warranted in finding that, on the occasion alluded to, the representation of the prisoner, in substance and effect, was: there is no mortgage or incumbrance on the land other than the Cross mortgage; the Kidder mortgage, which appears upon the search, is no incumbrance in fact; it is paid, and when it is discharged the land will be also clear upon the record. No claim is anywhere made that the Kidder mortgage was not in fact paid. We think it would have been error to have charged as fifthly and fifteenthly requested.

The exceptions to the refusals to charge as seventhly and eighthly requested, are not well taken. The signature of Carey to the check was obtained in the city of Buffalo. Our statute makes it an offense to obtain "the signature of any person to any written instrument" by false pretenses. The check was an instrument within the statute. (*People v. Gallowsay*, 17 Wend. R., 540.) It is possible that the prisoner could have been indicted and tried in Genesee county, for obtaining the money by means of the check. (*People v. Herrick*, 13 Wend. R., 87.) But the statutory offense of obtaining the signature of Carey

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to the check, was complete in Buffalo, and the prisoner could not, by persevering in his fraud to a fuller consummation of it, bar the offense committed by obtaining the signature. (*People v. Genung*, 11 *Wend. R.*, 18; *Commonwealth v. Wilgus*, 4 *Pick. R.*, 177.) There was no merger, for even if he could have been tried for obtaining the money upon the check, the offenses in the law are of the same degree. It is not material where the pretenses were made, the obtaining the signature or property by means of them, with intent to cheat or defraud, completes the crime, and determines the place of trial.

The judge properly refused to charge as tenthly and eleventhly requested. For it is not essential to this offense under the statute, that actual loss or injury should be sustained. (*People v. Genung*, *supra*.) The counsel says that the verdict of not guilty on the first count, and guilty on the second, is a *felo de se*. We are not able to see any difficulty or embarrassment in the verdict. The prisoner was put upon his trial for but one offense; and in such case, where there are several counts, it is competent for the jury to say under which count they convict, and to dispose of the other counts by acquitting upon them. The prisoner could not have been convicted under the first count, for obtaining the money through or by means of the check, for the money was obtained at Batavia, without the territorial jurisdiction of this court. He could not have been convicted under the first count, for obtaining the signature of Carey to the check, for he was not in that count charged with that offense. The charge was of obtaining Carey's written check upon the Bank of Genesee for \$2,000, the said check being the personal property and valuable thing of said Carey.

It may be questionable whether the check was the personal property or valuable thing of Carey within the statute; but be that as it may, the prisoner could be convicted of but one offense, and so is the verdict.

Proceedings affirmed.

SUPREME COURT. Monroe General Term, September, 1860.

E. D. Smith, Johnson and Knox, Justices.

THE PEOPLE V. JOHN CRAMER.

Form of an indictment for selling spirituous liquors in quantities less than five gallons, without license; of a plea thereto of *autrefois convict*; and of a replication to the plea.

On the trial of an indictment for having sold spirituous liquors without license, on the tenth of March and tenth of April, 1860, the defendant interposed a plea of *autrefois convict*, and on the trial proved by the record that he had been tried, before a Court of Special Sessions, on a charge of having, on the 16th day of April, 1857, and on the first of April, 1860, and on divers other days between these dates and the 9th of May, 1860, sold spirituous liquors in quantities less than five gallons without license, and that he was convicted of the charge and fined five dollars; it was held, that the plea was not sustained, and that, to make the defense available, the defendant ought to have proved by evidence *abundant*, that the offenses for which he had been convicted were the same violations alleged in the indictment.

THIS case came up on *certiorari* from the Court of Sessions of Livingston county, where the defendant was tried on the following indictment:

State of New York, County of Livingston, ss:

The jurors of the People of the State of New York, in and for the body of the county of Livingston aforesaid, upon their oath aforesaid, present, that John Cramer, late of the town of North Dansville, in the county aforesaid, on the tenth day of March, in the year of our Lord one thousand eight hundred and sixty, at the town and in the county of Livingston aforesaid, did sell and cause to be sold strong and spirituous liquors and wines in quantities less than five gallons at a time, to divers citizens of this State, and to divers persons to the jurors aforesaid unknown, and did then and there deliver and cause to be delivered, in pursuance of such sale to the said divers citizens of this State, and to the said divers persons to the jurors aforesaid unknown, the said strong and spirituous liquors and wines in quantities less than five gallons at a time, to wit: One pint of alcohol, one pint of wine, one pint of gin,

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one pint of brandy, one pint of rum, one pint of whisky, one pint of spirits, one pint of ale, one pint of strong beer, one pint of cordial, one pint of porter, one pint of distilled liquor, and one pint of mixed liquors, without having a license therefor granted as provided in the act of the legislature of the State of New York, entitled "An act to suppress intemperance and to regulate the sale of intoxicating liquors," passed April 16, 1857, and without any lawful authority, against the form of the statute in such case made and provided, and against the peace of the People of the State of New York and their dignity.

And the jurors aforesaid, upon their oath aforesaid, do further present that the said John Cramer, on the tenth day of March, in the year aforesaid, at the town of North Dansville, in the county aforesaid, did sell and cause to be sold strong and spirituous liquors and wines to divers citizens of this State, and to divers persons to the jurors aforesaid unknown, and did then and there deliver and cause to be delivered, in pursuance of such sale, to the said divers citizens of this State, and to the said divers persons to the jurors aforesaid unknown, the said strong and spirituous liquors and wines, to wit: One pint of alcohol, one pint of wine, one pint of gin, one pint of brandy, one pint of rum, one pint of whisky, one pint of spirits, one pint of ale, one pint of strong beer, one pint of cordial, one pint of porter, one pint of distilled liquor, and one pint of mixed liquors, to be drank in the house and shop of him, the said John Cramer, there situate, and in the outhouse yard and garden appertaining thereto, and did then and there suffer and permit the said liquors and wines so sold by him and under his directions and authority, to be drank in his house and shop, and in the outhouse, yard and garden thereto belonging, without having obtained a license therefor as an inn, tavern, or hotel keeper, and without being in any manner thereunto authorized by law, against the form of the statute in such case made and provided, and against the peace of the People of the State of New York and their dignity.

G. BULKLEY, *District Attorney.*

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There was a third count like the first, except that it charged the offense to have been committed on the tenth day of April, 1860.

On the 27th day of April, 1860, the defendant pleaded not guilty, and afterwards, at the June term, 1860, the defendant interposed the following plea :

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} June Term, 1860.

And the said John Cramer, in his own proper person, cometh into court here, and having heard the said indictment read, saith : That the People ought not further to prosecute the said indictment against him, because he saith that heretofore, to wit, at a Court of Special Sessions of the Peace, duly held by and before Thomas Romig, then and there and now a justice of the peace in and for said county, and duly authorized and empowered to hold said Court of Special Sessions, and holden at North Dansville, in said county, on the 10th day of May, A. D. 1860, he, the said John Cramer, was lawfully convicted of the said offense charged in said indictment, and that he, the said John Cramer, was also, by the said Court of Special Sessions, then and there sentenced to pay a fine of five dollars on the day last aforesaid, which said fine he paid to said Court of Special Sessions. And this he is ready to verify ; wherefore he prays judgment, and that by the court here he may be dismissed and discharged from the said premises in the present indictment specified.

Livingston County, ss :

John Cramer, the defendant in the above entitled indictment, being duly sworn, says that he has heard the foregoing plea, by him signed, read, and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated upon information and belief, and as to those matters he believes it to be true.

JOHN CRAMER.

Sworn to before me, this }
5th day of June, 1860. }

THOMAS ROMIG, *Justice of the Peace.*

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To which plea the following replication was put in by the district attorney :

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And whereupon Gershom Bulkley, district attorney, who prosecutes for the People of the State of New York in and for the body of the county of Livingston, in this behalf says, that by reason of anything in the said plea of the said John Cramer above pleaded in bar alleged, the said people ought not to be precluded from prosecuting the said indictment against the said John Cramer, because he says that the said John Cramer was not convicted of the offense charged in the said indictment in manner and form as the said John Cramer hath above in his said plea alleged, and this the said Gershom Bulkley prays may be inquired of by the country.

And for a further replication to the said plea of said John Cramer, said Gershom Bulkley, district attorney, as aforesaid, for the county of Livingston, who prosecutes for the People of the State of New York, in and for the body of the county of Livingston, in this behalf, says that by reason of anything in the said plea of the said John Cramer above pleaded in bar alleged, the said People ought not to be precluded from prosecuting the said indictment against the said John Cramer, because he says that after the said indictment against the said John Cramer was found by the grand jury of the said People in and for the body of the said county, and after the same was presented to the Court of Oyer and Terminer in said county by the said Grand Jury, and duly filed with the clerk of said Court of Oyer and Terminer, and after the same had been by said court sent into the said Court of Sessions to be tried, to wit, on the 10th day of May, 1860, at the town of North Danaville, in said county, the said John Cramer, knowing that said indictment was found and filed as aforesaid, fraudulently and with intent to preclude and prevent himself from being tried on said indictment by and before this court, and to prevent and preclude himself from being convicted in this court

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of the said several crimes in said indictment alleged, and to cause a small fine to be imposed on him by the justice hereinafter mentioned, and to escape the higher, greater and severer judgment, fine, and punishment of this court, and to deprive this court of jurisdiction to try said indictment, caused an information and complaint to be made against himself for the offense in the plea of the said John Cramer mentioned, before Thomas Romig, Esquire, a justice of the peace in said plea mentioned, and did then cause a warrant for his apprehension to be issued by said justice in pursuance of said complaint against himself, and caused himself to be arrested and brought before the said justice on said warrant, and then and there being so brought before the said justice as aforesaid, fraudulently caused himself to be convicted as in said plea stated, of the offense in said plea mentioned, and this the said Gershon Bulkley is ready to verify, wherefore he prays judgment, and that the said John Cramer may be convicted of the premises in the said indictment above specified.

G. BULKLEY, *District Attorney.*

The defendant then put in a rejoinder, denying all the allegations of the replication.

The issue thus joined, and the indictment, came on to be tried at a Court of Sessions held in and for the county of Livingston, on the 6th day of June, 1860, before the county judge and the justices of the sessions.

The defendant, on the trial aforesaid, proved and introduced in evidence, the following record of conviction :

" Livingston County, ss :

I, the undersigned, a justice of the peace of said county, do hereby certify, that at a Court of Special Sessions of the Peace, duly convened and held at the house of Thomas Romig, the undersigned, in the town of North Dansville, in said county, before me, the undersigned, Thomas Romig, for the trial of John Cramer, charged on the oath of Adam Ehle with having, on the 16th day of April, 1857, and on the first day of April, 1860, and on divers other days between those times.

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and the 9th day of May, 1860, at the place aforesaid, sold spirituous and intoxicating liquors in quantities less than five gallons, in violation of the law of the State of New York, passed April 16, 1857, entitled "An act to suppress intemperance, and to regulate the sale of intoxicating liquors." The said John Cramer then and there elected to be tried for said offense before me as such Court of Special Sessions, and pleaded guilty to the charge against him so made as aforesaid, whereupon the said John Cramer was duly convicted by such court of said offense, and upon such conviction the said court did adjudge and determine that for the said offense the said John Cramer should pay a fine of five dollars, and the said fine has been paid to the said court by the said John Cramer.

In witness whereof, I have hereunto set my hand at the town of North Dansville, the 10th day of May, 1860.

THOMAS ROMIG, *Justice of the Peace.*"

It was also admitted on said trial, that the defendant is the same person of that name mentioned and described in said record of conviction. The testimony here closed.

The district attorney requested the court to charge the jury that the evidence was not sufficient to sustain the plea. That it did not appear that the offense charged in the indictment was the same offense described in the record of conviction, and of which the said defendant was convicted before the Court of Special Sessions.

The court charged the jury that there was no legal evidence to show that the offense described in the record of conviction produced in evidence was the same offense described in the indictment, and that, therefore, it was their duty to find that the plea was not sustained by the evidence: that the conviction mentioned and described in the record of conviction introduced in evidence was not a bar to a recovery upon the indictment in this case.

To this charge the counsel for the defendant excepted.

The jury rendered a verdict, under the direction of the court, that the plea of *autrefois convict* so put in by said defendant, was not sustained by the proof.

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G. Bulkeley (District Attorney), for the People.

Hendee & Adams, for the defendant.

KNOX, J. On the third Monday of April, 1860, the defendant was indicted for violating the excise law. The indictment charged that the offenses were committed on the 10th of March, 1860, and on the 10th of April, 1860.

On the 10th of May, 1860, the defendant was convicted by a Court of Special Sessions of Livingston county, where the offenses alleged in the indictment were committed, of having violated the excise law, "on the 16th day of April, 1857, and on the 1st day of April, 1860, and on divers other days between those times and the 9th of May aforesaid," and was fined \$5, which was paid.

On the 10th of May, 1860, at a Court of Sessions in said county, the indictment came on for trial, when the defendant pleaded, in bar of the indictment, this conviction before the Special Sessions, upon which issue was joined, when the jury, under the direction of the court, found the plea of the defendant not sufficient. The only evidence in support of the plea was the record of conviction of the Court of Special Sessions. The court charges the jury that there was no legal evidence to show that the offenses mentioned in the record of conviction produced in evidence were the same offenses set forth in the indictment, and that the record was not a bar. Was this decision right?

It is very obvious that the record of conviction does not show that the defendant was convicted of the same offenses, before the Special Sessions, of which he is charged in the indictment. The offenses in the indictment are alleged to have been committed on the 10th of March and 10th of April, 1860; and, although the record shows that the defendant was convicted of offenses of a similar character, committed on the 16th of April, 1857, and the 1st of April, 1860, and on divers other days between those times and the 9th of May, 1860, which time may cover the time set forth in the indictment, it

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does not show that they were the identical offenses charged in the indictment. A plea of "*autrefois convict*" cannot be established without such proof. It is clearly possible for the defendant to have committed many violations of the excise law, during the period alleged in the record of conviction, which might not be the same violations charged in the indictment, and, therefore, if he was convicted of the same identical offenses, he should have proved the fact by evidence outside the record. (*See 1 Park. Cr. R.*, 184, and cases there cited.)

The plea alleges that the defendant was lawfully convicted of the offenses charged in the indictment. As the plea admitted the commission of the offenses, the only question was, were they the same offenses? As the record did not show that they were identical, it lay with the defendant to establish, by proof, *aliunde*, that such was the fact. This he did not do, or attempt to do.

The decision of the judge was correct, and the verdict right.

Proceedings remitted.

SUPREME COURT. New York General Term, November, 1861.
Clerke, Ingraham and Sutherland, Justices.

JOHN WILSON, plaintiff in error, v. THE PEOPLE, defendants
in error.

Where, in an indictment for forgery, the counterfeit note, which it is charged the prisoner had in his possession, is set forth in *hæc verba*, it is unnecessary to allege, in addition, that the note purported to be the act of another. On the trial of an indictment for forgery, the counterfeit note offered in evidence had upon its face the words, "Countersigned and registered in the Bank Department," and the signature of the register, "A. D. Ward." No such certificate or signature appeared on the note set forth in the indictment. It was held to be no variance.

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THIS case came before the court on a writ of error to the New York General Sessions. The questions raised on the trial are sufficiently stated in the opinion of the court.

John Sedgwick, for the plaintiff in error.

N. J. Waterbury (District Attorney), for the People.

By the Court, SUTHERLAND, J. There is no question in this case, except the one as to variance and the validity of the indictment. This question I think very plain.

The forged and counterfeited note, which the indictment alleges the prisoner had in his possession, is set forth in the indictment in *hæc verba*; it was therefore unnecessary for the indictment formally to allege, in addition, in the words of the statute, that the note purported to be the act of another, &c. (*The People v. Rynders*, 12 *Weqd. R.*, 430.)

When the note was produced on the trial, the counsel for the prisoner objected to its being put in evidence on the ground of variance, the note, as set forth in the indictment, not appearing to have upon it the certificate, "countersigned and registered in the Bank Department," and the signature of the register, "A. D. Ward."

The objection was overruled, and an exception taken.

The ruling of the court was clearly right. The certificate of the register is no part of the note. As to the bank the note is a valid note without the registering, certificate, &c. The statute requiring the registering, &c., is for the protection of the public, not of the bank. If the bank, without regard to the requirements of the statute, issues notes to circulate as money, how can it set up its infraction of the law as an excuse for not paying or redeeming the note? If it could do so, it would be taking advantage of its own wrong, and that no bank or individual can do.

The note set forth in the indictment, without the certificate of the register, if genuine and actually issued by the bank, would have bound the bank, and would have been the sub-

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ject of forgery, and therefore I think the objection, on the ground of variance, not well taken.

It seems that in England forgery might be committed on unstamped paper. (2 *East Cr. L.*, 955; *Hawkeswood's Case*.)

The judgment of the General Sessions should be affirmed.

Judgment affirmed.

SUPREME COURT. New York General Term, December, 1861.
Sutherland, Ingraham and Clarke, Justices.

THE PEOPLE v. FELIX MCARDLE.

On the trial of an indictment for seduction, under a promise of marriage, the prosecutrix testified that she had never had sexual intercourse with any other person than the defendant. *Held*, That it was competent on the part of the defense to contradict her evidence, either directly, by actual proof of such intercourse with others, or by facts from which the jury could infer such intercourse; and that, for the latter purpose, it was proper to prove by a witness that he had seen her commit wanton or lewd acts towards some other person than the defendant.

THIS case comes before the court on *certiorari*.

The plaintiff in error was tried and convicted on the 15th of March, 1861, in the New York General Sessions, upon an indictment charging him with the seduction, under promise of marriage, of one Ann Donnelly.

The prosecutrix was called as a witness on the trial, and testified, among other things, that she had never had any sexual intercourse with any other person than the defendant.

During the progress of the trial the defense put to its witnesses the following questions in relation to the prosecutrix: 1st. "Do you know her character for intemperance and indecent behavior?" 2d. "Have you seen her playing at cards, swearing and drinking to intoxication, on the same occasion?" To these questions the People objected, on the ground that

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the only admissible evidence on the subject of chastity was evidence of sexual intercourse previous to the seduction. The court sustained the objection on this ground. Exceptions there taken. 3d. "Did you ever hear her use any indecent, obscene language; and, if so, state what it was, and under what circumstances it was used?" 4th. "Did you ever see the complainant commit any wanton or lewd act towards McGainnes?" The district attorney objected generally to these questions, which objections were sustained, and exceptions taken. 5th. "Do you know the general moral character of the complaining witness?" The district attorney objected generally; the objection was sustained, and exception taken.

John Sedgwick, for plaintiff in error.

I. The prosecution is bound to show the woman to be of "previous chaste character." (3 *R. S.*, 5th ed., p. 942, sec. 28.) The statute against abduction has like words. (*Ib.*, p. 943, sec. 27.) The individual has no protection from the criminal law, if she have so broken down the safeguards to her own virtue, that the influence obtained over her by the promise of marriage is not, in fact, the cause of her seduction. Society will not be injured when the seduction occurs to a female already unchaste, and therefore not made less capable of performing her obligations in all the relations of society.

II. The words "of previous chaste character" must necessarily refer to the moral condition of the female, her conscience, her passions, &c. It cannot mean physical attribute or condition. They make no part of character. If this be correct, it satisfies the reasons for the statute.

III. Evidence of general reputation, or of specific acts of the female, is competent proof of unchastity of character. (*Carpenter v. The People*, 8 *Barb. R.*, 608; *Stafford v. The People*, 1 *Park. Cr. R.*, 474; *Crozier v. The People*, 1 *Park. Cr. R.*, 453.)

IV. If it be not necessary to show an act of sexual intercourse to prove unchastity of character, the questions overruled were directly relevant. They might have shown obscen-

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ity, intemperance, profanity, coupled with intoxication and lewd and wanton acts toward a man. If a female combined all these vices, could a jury or a court pronounce her to be of "chaste character?"

But if it be granted that the statute refers to a single test of chastity, i. e., to sexual intercourse, as the only definite or uniform mode of judging, then, if a jury might infer from the facts proposed by the questions that sexual intercourse had occurred, though with an individual not specified or unknown, the questions should have been admitted.

If a jury could have seen the prosecutrix swearing, drunk, using obscene words, and doing lewd and wanton acts toward a man, what would they have pronounced her?

V. The question, Do you know the general moral character of the complaining witness? was improperly overruled, because of the considerations stated above, as it is settled that general reputation is admissible to show unchastity of character, and also as a proper foundation for a question to be put as to whether the complainant could be believed under oath. (*Gilbert v. Sheldon*, 13 Barb. R., 628; *People v. Johnson*, 3 Hill R., 178; 2 Phillips on Ev., p. 956, note 598.)

John H. Anthon, for the defendants in error.

I. The court was correct in ruling that the only admissible evidence on the subject of chastity, was evidence of sexual intercourse previous to the seduction, and this ruling is sustained by the authorities in this State. (*Crosier v. The People*, 1 Park. Or. R., 453; *Stafford v. The People*, Id., 474; *Carpenter v. The People*, 8 Barb. R., 608.)

II. This ruling accords with the general and usual significance of the words "previous chaste character" used in the statute. (*Worcester's Dictionary*, new ed., "chaste" and "chastity;" *Webster's Dictionary*, Id.)

III. The policy of the law indicates the ruling adopted by the court. It contemplates a "chaste character" "previous" to the seduction, and necessarily terminated by it; and this

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in reference both to a supposed additional turpitude in the offender, and the greater injury to the woman.

IV. The question as to the general moral character of the complainant, was wholly inadmissible in relation to the chastity of the complainant, and it was also inadmissible as evidence to impeach the credibility of Ann Donnelly.

1. It was offered as evidence upon the question of chastity, and not upon the question of credibility, as is shown by the connection, the absence of any offer of further question connected with it, and of other assault upon the credibility of the witness; and a party who neglects at the proper time to state the object of testimony objected to, or to offer the questions necessary to make it relevant, is not at liberty, after verdict, to hunt out some aspect of the case not touched by other testimony to which it might have been relevant. (*Whart. Am. C. L.*, 998, 3d ed; *Barksdale v. Toomer*, 2 *Bailey R.*, 180; 2 *Graham & Waterman, New Trials*, 669; *Rex v. Grant*, 3 *Nev. & Mann. R.*, 106.

2. The proper question as to the general character of a witness, in relation to his credibility, is: "From your knowledge of his general character, would you believe him under oath?" and though for convenience this question may be divided, yet all of its component parts must be offered, and preceded by proof that the witness knows the character he is to speak of. (*Roscoe Cr. Ev.*, 176, and cases cited; 2 *Phillipp's Ev.*, 955, 4th ed.; *People v. Mather*, 4 *Wend. R.*, 259; *Gilbert v. Sheldon*, 18 *Barb. R.*, 623; *Beekman v. Rose*, 18 *Wend. R.*, 146; *Johnson v. People*, 3 *Hill R.*, 178; *U. S. v. Vansickle*, 2 *McLean R.*, 219; *Thayer v. Boyle*, 30 *Me. R.*, 475; *Wilie v. Lightner*, 11 *Serg. & Rawle R.*, 198.)

V. All questions as to specific acts were rightly excluded, as not proper to show general character or to impeach. (*Fulton Bank v. Benedict*, 1 *Hall S. C. R.*, 558; 2 *Phillipp's Ev.*, 956, 4th ed.; *Roscoe Cr. Ev.*, 176.)

VI. Most of the questions excluded, so far as they are alleged to have been applicable to the previous chaste charac-

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ter of Ann Donnelly, were objectionable from the omission to confine them to a time previous to the seduction.

By the Court, INGRAHAM, J. The public prosecutor proved, on the trial of this case, by the prosecutrix, that she had never had any sexual intercourse with any other person than the defendant. Whether such evidence was necessary or not on the part of the People, is immaterial. The evidence was given, and had its effect on the jury in deciding the case. The defendant then had a right to contradict this evidence, either directly by actual proof of such intercourse with others, or by facts from which the jury could infer such intercourse to have taken place. For the latter purpose, we think the questions as to the unchaste conduct of the prosecutrix were proper, and should have been received. They were properly within the class of evidence which might go to the jury on the question of chastity. The fourth question, "Did you see her commit any wanton or lewd acts towards McGaines?" was specially applicable to this branch of the case; and the answer might have been such as to warrant a jury in disbelieving the assertion of the prosecutrix to the contrary.

The judgment must be reversed, and a new trial ordered in the Sessions.

SUPREME COURT. Dutchess General Term, July, 1861. *Elmott, Brown and Scrugham*, Justices.

WILLIAM M. WAIT v. DUNCAN C. GREEN.

A Court of Special Sessions, held under the act of 1857, ch. 769, § 1 (3 R. S., 5th ed., 1000), has no jurisdiction of a charge of "malicious mischief."

G., a justice of the peace, issued a warrant for the arrest of W., on a charge that he "did willfully and maliciously unhook the traces of the harness on a span of horses, and then hitched to the wagon, then owned or in the possession of one L." W. was arrested under the warrant, and tried before G. at a Court of Special Sessions, and convicted of the offense charged, which was recited in the warrant and in the commitment in the words above quoted, and was held in custody under the commitment until discharged on *habeas corpus*. *Held*, that G. acted without jurisdiction, and was liable to an action for false imprisonment for the arrest.

Held, also, that on the trial of the action for false imprisonment, it was not competent for G. to prove that it was shown before the Court of Special Sessions that L. was in the wagon at the time the traces were unhooked, for the purpose of establishing an assault on L., and thus showing jurisdiction in the court, there being no such offense charged in the warrant or commitment.

The willful trespasses over which jurisdiction is given to courts of Special Sessions, by the act of 1857, ch. 769, § 1 (3 R. S., 5th ed., 1000), do not include cases of "malicious mischief;" they refer only to such willful trespasses upon real estate as are made indictable and punishable as misdemeanors by statute.

A malicious act, however wanton or dangerous, which does not result in any destruction or even injury to property, does not amount to the misdemeanor known as "malicious mischief."

THIS was an action for false imprisonment. The defendant, who was a justice of the peace, justified under proceedings before him as a Court of Special Sessions.

The action was tried at the Dutchess Circuit.

It appeared on the trial that on the 22d day of March, 1860, the plaintiff was arrested on a warrant, of which the following is a copy:

"*Town of Pawling, Dutchess county, ss:* To any constable of the said county: Whereas Daniel Luddington hath this day made complaint upon oath before me, Duncan C. Green, one of the justices of the peace of the said town, that on the 30th day of April, one thousand eight hundred and fifty-nine,

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at the town of Pawling, in the said county, one Wm. M. Wait did willfully and maliciously unhook the traces of the harness on a span of horses, and then hitched to the wagon then owned or in possession of said deponent, therefore the People of the State of New York command you forthwith to apprehend the said William M. Wait and bring him before me, to be dealt with as the law directs. Dated the 20th day of March, 1860.

DUNCAN C. GREEN, *Justice of the Peace.*"

The warrant had been issued on the following affidavit:

"*State of New York, Dutchess county, ss:* Daniel Luddington being duly sworn, doth depose and say, that on the 30th day of April, one thousand eight hundred and fifty-nine, at the town of Pawling, in said county, one Wm. Wait did willfully and maliciously unhook the traces of the harness on a span of horses, and then hitched to the wagon then owned or in possession of said deponent; wherefore this deponent prays that the said offender may be dealt with according to law.

DANIEL LUDDINGTON.

Sworn before me this 20th }
day of March, 1860, }

DUNCAN C. GREEN, *Justice.*"

The trial took place before the defendant, holding a Court of Special Sessions, on the 24th day of March, 1860, when the following commitment was issued:

"*State of New York, Dutchess county, ss:* To any constable of the said county, greeting: At a Court of Special Sessions duly held by the undersigned, a justice of the peace of the said county, this 24th day of March, 1860, at his office in the town of Pawling, in said county, William M. Wait was brought before the said court, charged on oath of Daniel Luddington with having on the 30th day of April, 1859, at the town of Pawling, in said county, willfully and maliciously unhooked the traces of the harness on a span of horses, and then hitched to the wagon then owned or in the possession of said Luddington, which charge being stated in the warrant by me issued, was distinctly read to the defendant in open court,

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to which he pleaded not guilty. Whereupon such proceedings were had in said court that the defendant was convicted of the charge above specified, and the court having rendered judgment thereon that said William M. Wait should pay a fine of (\$8.00) eight dollars, and the said Wait having refused to pay said fine, therefore the People of the State of New York command you to convey the said William M. Wait to the common jail of the said county, the keeper whereof is hereby required to keep him in safe custody in the said jail until the judgment so rendered be satisfied, or he be discharged by due course of law.

Witness my hand, this 24th day of March, 1860.

DUNCAN C. GREEN, *Justice of the Peace.*"

Under this commitment, the plaintiff was arrested and brought to Poughkeepsie, and kept in custody until discharged on the same day, on a writ of *habeas corpus*.

It was proved that the plaintiff paid his counsel five dollars for his services in procuring his discharge. This evidence was objected to by the defendant, and its admission excepted to.

A motion for a nonsuit was made and refused, and the defendant excepted.

The defendant was then called as a witness, and testified that he was a justice of the peace, residing in the town of Pawling, in the county of Dutchess. That Daniel Luddington made the complaint before him on which the warrant was issued.

That it was proven before the defendant at the time, before the warrant was issued, that the plaintiff unhooked the traces of the harness on a pair of horses belonging to Luddington, in the night time, when said Luddington was in a wagon, to which the horses were hitched, driving the same at the depot. That Wait admitted on the trial that he did unhitch the traces, as claimed by Luddington. The evidence as to what was proved on the issuing of the warrant, and on the trial, was objected to by the plaintiff's counsel, and received subject to exception.

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It appeared that on the trial before the Court of Special Sessions, Wait presented a paper containing written objections to the proceeding, in which he asked to be discharged on the grounds:

1st. That the court had no jurisdiction of the case, or of the person of Wait, as there was no offense alleged in the warrant, and it did not show that any crime had been committed.

2d. That to constitute malicious mischief or injury, it must be done out of malice to the person, and to his damage. That unless there was actual injury committed, there was no crime.

3d. That a Court of Special Sessions had no jurisdiction to try any offenses, except those enumerated in Session Laws of 1857, 2d vol., p. 705.

The court, afterwards, on motion, ordered all the testimony of Green, as to what was proved before him at the time of issuing the warrant, and on the trial before the Court of Special Sessions, to be struck out of the case, to which the defendant's counsel excepted.

The court charged the jury that there was no authority to make the arrest, that the false imprisonment was established, and the only question for the jury was, the amount of damages which the plaintiff should recover.

The jury rendered a verdict for the plaintiff for fifty-two dollars and fifty cents, and the case was brought before the general term, on an application for a new trial.

J. F. Barnard, for the defendant.

I. An attempt, with force or violence, to do a corporeal injury, is an assault, and may consist of any act tending to such injury. There need not be a direct attempt at violence. (*Hays v. The People*, 1 Hill R., 351.)

Striking a horse on which plaintiff's wife was riding, and starting a squib which was thrown from hand to hand until it struck a person, held in both cases assault and battery. (2 *Petersdorf Abr.*, tit. *Assault and Battery*.)

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II. A court holding jurisdiction of all criminal cases is protected if it judges that criminal which is not. (3 *Cowen & Hill's Notes*, vol. 2, note 993, and cases there cited.)

III. Malicious mischief is a misdemeanor, punishable at common law, and is defined to be an act injurious to private persons, committed through a spirit of wanton cruelty or revenge, which tend to create resentments. (4 *Black. R.*, 248; *Barb. Cr. Law*, 208.)

IV. Justices of the peace can issue criminal warrants in all criminal cases. (2 *R. S.*, 706, sec. 1.)

After arrest he must hear charge read and demand examination in misdemeanors, and if, after prosecutor and witnesses are examined, he be held and offer no bail, he shall be committed to jail. (2 *R. S.*, 709, sec. 26.)

The officer granting writs of *habeas corpus* to disregard irregular commitments, and, if no bail be offered, to remand. (2 *R. S.*, 568, sec. 48.)

V. If the offense charged is an assault, then the justice had jurisdiction to try.

If the justice erroneously held it to be an assault, it cannot be reviewed collaterally.

If the offense was malicious mischief, the justice had jurisdiction of the offense, and the arrest was legal, and the defendant in warrant (plaintiff) could not be discharged, except by offer of bail or discharge by the justice. The discharge of plaintiff is void, for want of jurisdiction in him, and the plaintiff is yet in custody under the justice's commitment.

VI. The justice who heard the action erred in admitting evidence of money paid by plaintiff upon *habeas corpus* proceedings, it not having been specially stated in complaint. (*Strong v. Whitehead*, 12 *Wend. R.*, 64.)

H. A. Nelson, for the plaintiff.

I. Neither the complaint, warrant or commitment sets forth any criminal offense. (2 *R. S.*, 711, § 1; *Laws of 1857*, vol. 2, p. 705.)

The judge was right in striking out the evidence. All

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the defendant claimed in his answer was, that a complaint was made to the defendant, as a magistrate, that a criminal offense had been committed, "to wit, a malicious trespass," and this was the only issue to be tried. And the defendant, on the trial, did not ask to have the answer amended.

The charge did not come within any of the provisions of the statute making certain trespasses misdemeanors. (2 R. S., 698.)

II. The cause of action was fully established, and there was no question of fact to be passed upon by the jury, except as to the amount of plaintiff's damages. (8 Phil. Ev., 515, 4th Am. ed.; 1 Bald. R., 571, 600; *Percival v. Jones*, 2 Johns. Cas., 49; *Reynolds v. Orvis*, 7 Cow. R., 269; *Taylor v. Trask*, Id., 250, 251; *Perry v. Mitchell*, 5 Denio R., 537; *Curry v. Pringle*, 11 Johns. R., 444; *Bigelow v. Stearns*, 19 Id., 89; *Vredenburg v. Hendricks*, 17 Barb. R., 179.

III. Plaintiff was entitled to recover the amount he necessarily paid in regaining his liberty. Such expenses were sufficiently averred in the complaint. Defendant not having asked that plaintiff make the allegation more definite and certain, could not object on the trial. (12 Wend. R., 64; Code, § 160.)

By the Court, EMOTT, J. This was an action for false imprisonment, tried before me at the Dutchess Circuit. The plaintiff was arrested on a warrant issued by the defendant, who was a justice of the peace, and, although objecting to the jurisdiction, was tried, convicted and sentenced by a Court of Special Sessions, held by the defendant, to a fine, and to be imprisoned until it was paid. He was released upon *habeas corpus*, and subsequently brought this action.

The warrant of arrest and the commitment recited the offense to be, that the prisoner, the present plaintiff, "did willfully and maliciously unhook the traces of the harness on a span of horses and then hitched to the wagon then owned or in the possession of" one Luddington.

At the trial of this action, the imprisonment was defended on the ground that, by the evidence before the magistrate,

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Luddington was shown to have been in the wagon at the time, and it was contended that the plaintiff had therefore committed an assault, an offense of which a Court of Special Sessions, of course, has jurisdiction. But neither the warrant nor the record of conviction or commitment, specify any such offense as an assault, nor do they state sufficient facts to constitute an assault. The offense for which the plaintiff was tried and convicted was maliciously unhooking the traces from horses, when harnessed to the complainant's wagon. If Luddington, the owner, was in the wagon at the time, the act of the plaintiff was an assault upon him; or if some one else was there, then upon such other person. But no such person was specified, and no such offense was charged in the warrant or commitment; and the plaintiff may have committed the act charged in the warrant and commitment, and still have committed no assault. He could not, however, be arrested, tried and convicted for an act which, if it were an offense, was one of which the court had no jurisdiction, and his imprisonment afterward justified by showing that the evidence at the trial would have convicted him of another offense which was triable in a Court of Special Sessions.

Assuming that a Court of Special Sessions has no jurisdiction to try a man for malicious mischief, or for the act charged in these proceedings, if it were a criminal offense, we are all clearly of opinion that this was a case of false imprisonment; and that evidence of what took place on the trial in the Sessions, tending to make out an assault, was irrelevant, and that it was properly struck out of the case, and excluded from the consideration of the jury. We do not think it necessary to discuss the proposition which was advanced, that inasmuch as the defendant could have arrested the plaintiff and held him to bail for committing an act of malicious mischief, he can therefore justify proceeding to a trial which resulted in a conviction and sentence. We are also of opinion that the evidence which was objected to upon the question of damages, was properly received. The utmost which this objection involves, would be an amendment of the complaint.

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These embrace all the questions raised at the trial or on the argument. One of the members of the court, however, has entertained doubts whether Courts of Special Sessions are not authorized to try cases of malicious mischief under the existing statute (2 *R. S.*, 711, § 1; 2 *R. S.*, 5th ed., 1001), and I have, therefore, considered that question. The fifth subdivision of this section of the statute gives to the Special Sessions jurisdiction to try "charges for committing any willful trespass, or for severing any produce or article from the freehold, not amounting to grand larceny." I am unable, after careful consideration, to agree to a construction of this statute which would bring the act charged in the proceedings against the plaintiff within its provisions, for various reasons which seem to me sufficient.

The offense of malicious mischief has been recognized in this State as a misdemeanor at common law, although the multiplicity of the statutes to punish such offenses in England has led to the impression that the offense is created by statute. The language used by Blackstone (4 *Black. Com.*, 243), in the passage cited by the defendant's counsel, to prove that malicious mischief is an offense at common law, would perhaps lead to that conclusion. But the line which separates a mere trespass from a criminal act, has been by no means clearly defined. In *The People v. Smith* (5 *Cow. R.*, 258), an indictment for maliciously killing a cow was sustained. In *Loomis v. Edgerton* (19 *Wend. R.*, 419), maliciously breaking to pieces a sleigh was held to be a criminal offense. On the other hand, in *Kilpatrick v. The People* (5 *Denio R.*, 277), maliciously breaking two windows in the house of another person, was held not to be a criminal offense. In the latter case stress was laid upon the fact that the act complained of was not committed secretly, nor in the night time, and was not an act of cruelty to a domestic animal. In England, as has been already intimated, the limits of this class of offenses, and their punishment, are defined by numerous statutes, so that but few, if any, cases can be found which were decided by the common law. The statutes of Great Britain make many trespasses

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criminal offenses, which, without them, would be only wrongful acts, to be redressed by damages in a civil action. So there are various statutes with us making certain trespasses punishable criminally. But it is obvious that every trespass is not a criminal offense, although every trespass is in the eye of the law "willful," and even "malicious." Judge BEARDSLEY, in *Kilpatrick v. The People*, says, very justly and pointedly, that malice is an ingredient in every intentional wrong, but that even a malicious intent to do an act of injury, without hope or expectation of profit to the wrongdoer, will not make the act indictable. It is quite clear, I think, that there is no such criminal offense at common law as a "willful trespass." Every wrongful act to the person, or personal or real property of another, is a willful trespass, and this, as a generic term, will include all crimes to the person, and some offenses against property. But the term defines a class of wrongful acts merely, and not of crimes. It is not the same as "malicious mischief," which describes acts criminal at common law. On the contrary, the two classes of wrongs are plainly and broadly distinguishable. In the clause of the statute now in question, the phrase, willful trespass, does not, therefore, describe any crime, except as such an act is made such by statute. There are certain willful trespasses which are indictable and punishable, and the present statute refers to these only.

The context and connection of the words in the statute are also sufficient, to my mind, to show that the trespasses referred to are acts of trespass upon lands. The statute confers jurisdiction upon Courts of Special Sessions to try various specified acts of wrong to persons and property, which are crimes by common law and by statute, and which would be included within willful trespasses, if that term should be construed in its ordinary or full legal sense. In the clause in question, the word trespass is directly connected with the freehold, in such a way as to show that the meaning of the whole clause is, any willful trespass upon the freehold, or any severance of property therefrom, which is not a larceny. This is to me the

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obvious, and, I believe, has been the universal construction of this part of the statute.

The statute was intended to refer to certain trespasses which are made misdemeanors by the statute of misdemeanors. (2 R. S., 693, § 15.) The language of the latter statute is identical with that before us, describing the offenses referred to as willful trespasses, and all the trespasses which the statute of misdemeanors makes criminal, are trespasses upon real estate. It is these willful trespasses, made criminal by positive statute, which are triable in Courts of Special Sessions, and not a totally different class of acts which might be described as acts of malicious mischief, and which are only criminal when they come within the cases or the definition of acts of malicious mischief, and are thus more than merely willful trespasses.

If, therefore, the act described in this commitment, were an act of malicious mischief at common law, it would not be included within the provisions of this statute, or the jurisdiction which it confers upon Courts of Special Sessions.

But I must add that it is very clear to me that the act specified by the proceedings was not an act punishable criminally as a malicious mischief. Even if it had been committed while the owner of the horses, or any other person was in the wagon, it could hardly have been construed a malicious mischief, because no harm appears to have ensued. It is not alleged that any injury was done to the horses or the wagon, the whole charge being that the harness of the horses was maliciously unhooked. The essence of the crime of malicious mischief, is the injury to property, and this must be marked by some peculiar features to convert it from a trespass into a crime. An act which, however wanton and dangerous, is not, and does not result in the destruction, or even the injury of property, is not an act of malicious mischief or a misdemeanor, under this head of the law.

I am of opinion that the warrant of arrest, and the commitment, recited no offense whatever, and that if any were committed, taking all the facts proved, or alleged to have been proved at the trial before the magistrate, it was a constructive

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assault upon the person in the wagon at the time, which was not the offense for which the plaintiff was tried or convicted, and cannot, therefore, justify his imprisonment.

The plaintiff is entitled to judgment upon this verdict, in my opinion, beyond any question.

Judgment for plaintiff.

SUPREME COURT. Erie General Term, September, 1861. *Marvin, Davis and Grover*, Justices.

THE PEOPLE v. THE NEW YORK CENTRAL RAILROAD CO.

In an indictment against a railroad company, for an unlawful and willful neglect to erect and maintain fences on the sides of the road, it is necessary to aver that it was the duty of the corporation to erect and maintain such fences.

THIS case came before this court on a *certiorari* to the Court of Sessions of the county of Genesee. On the trial in that court, the defendant objected that the indictment, which was for an unlawful and willful neglect to erect and maintain fences on the sides of the road, contained no averment that it was the duty of the defendant to erect and maintain such fences. The objection was overruled, and the defendant convicted, and the case was afterwards brought up for review by a writ of *certiorari*.

M. H. Peck, for the plaintiff in error.

Geo. Bowen, for the defendant in error.

By the Court, MARVIN, J. The indictment against the plaintiff in error, was for an unlawful and willful neglect to erect and maintain fences on the sides of its railroad. The indictment is sufficiently formal, and contains all the necessary averments, unless it is necessary to aver that it was the duty of the corporation to erect and maintain the fences.

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As the statute requires railroad corporations to erect and maintain fences, the counsel for the people supposes that no *averment* of a duty is necessary in an indictment for neglecting to erect and maintain such fences, and the Court of Sessions so held by overruling the objection of the counsel for the corporation, and holding the indictment sufficient. In my opinion the court erred. I find, on consulting the precedents of indictments for neglecting to repair highways, bridges, &c., that they all contain an averment that the defendant "ought to have repaired and amended, and still of right ought to repair and amend when and as often as it should or shall and may be necessary." (*See the forms, 3 Chitty Cr. L.*, 578, *et seq.*; *Archbold Cr. Pl.*, 643.) When the indictment is against a parish, Archbold says, it is not necessary to aver the liability of the parish to repair, for the law presumes that until the contrary is shown. (*Archbold Cr. Pl.*, 645.) The parish may, by a special plea, show that others ought to repair and amend the highway. (*Id.*, 646.) When the indictment is against an individual, or a township or class of persons not of common right bound to repair, the mode in which the defendant became liable must be stated. (*3 Chitty Cr. L.*, 571; *5 Burr.*, 2700; *2 Saund.*, 158, *n. q.*; *2 T. R.*, 513.)

In the cases referred to, the common law imposed the duty, and the presumption was that the parish was bound to repair, and in all other cases the mode in which the defendant became liable must be stated. It was argued in this case that the duty was imposed by statute, and that no averment of duty was therefore necessary. Perhaps it was not necessary that the indictment should contain a formal averment of duty or obligation to erect and maintain the fences, but it should, at least, have alleged the allegations in the form of the statute by a recital of it, or some reference to it in such a manner as to show the obligation or duty of the defendant.

In *Kane v. The People* (*3 Wend. R.*, 363), the indictment set forth the substance of the act of incorporation, and the duties and liabilities of the president and directors were described. The neglect to repair the road, as they were and *still are*

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required to do, is alleged. In a second count, the duty to keep the road in good order and repair is alleged. (*S. C.*, 8 *Wend. R.*, 205, 206.) The statute, in that case, made it the duty of the president and directors of the corporation to maintain and keep the road in good repair, and a neglect of that duty was made a misdemeanor in the president and *individual* directors. Kane and two others, directors, were indicted under the statute incorporating the company. It was objected in the Court for the Correction of Errors, that the indictment was not sufficiently specific. To this objection the Chancellor says, the indictment recites the substance of the statute, which shows that it was the duty of the directors to keep the road in repair, and he might have added that it also averred the duty. In the present indictment, there is no reference to the statute, except that it concludes, "contrary to the form of the statute in such case made and provided," without having recited any portion of the statute, or averring any obligation or duty on the part of the defendant to erect or maintain fences. In my opinion, the indictment is defective, and for this reason the judgment should be reversed.

The principal question discussed upon the argument was, whether the indictment would lie against the defendant for neglecting to erect and maintain fences. Having come to the conclusion that the indictment is defective, I abstain from expressing any opinion upon the question, whether an omission to erect and maintain fences is an indictable offense.

Proceedings reversed, and indictment quashed.

SUPREME COURT. New York, November Term, 1861. *Clerke, Sutherland and Ingraham, Justices.*

FREDERICK FREUND, plaintiff in error, *v.* THE PEOPLE, defendants in error.

Under an indictment for arson in the first degree, a prisoner may be convicted of arson in the third degree, when he is proved to have set on fire a house, as well as the goods in it, for the purpose of prejudicing the insurer.

On the trial of such a charge, evidence that the prisoner had procured an insurance is competent for the purpose of showing motive.

Where the certificate of an insurance company had been introduced on the trial, for the purpose of showing that the prisoner had effected an insurance on the property, and the only objection made to it was that evidence of the fact sought to be proved was not admissible under an indictment for arson in the first degree, *Held*, that no error had been committed by receiving the paper in evidence.

And where the execution of such a certificate had been duly proved, it was held not erroneous to permit also to be read in evidence a policy of insurance annexed to the certificate, and referred to in it, without proof of the execution of the policy, it appearing that no injury could possibly have resulted to the prisoner from its being put in evidence, the motive for the firing having been already abundantly proved.

THIS was a writ of error to the Court of General Sessions of the city and county of New York, in which court the prisoner had been convicted of arson in the third degree, under an indictment charging arson in the first degree.

The questions raised on the trial sufficiently appear in the opinion of the court.

H. Morrison, for the plaintiff in error.

N. J. Waterbury (District Attorney), for the defendants in error.

By the Court, CLERKE, P. J. The decision of the Court of Appeals in *Dedieu v. The People* (22 N. Y. R., 178), has no application to the case before us. In that case it was decided that, under an indictment charging arson only in the first degree, the prisoner cannot be convicted of the third degree of arson, when the proof shows that he merely burned goods with intent to defraud the insurer. In this case, the proof shows that the house itself was set on fire, not merely the

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goods; and the only resemblance between the two cases is that the object of the perpetrator of the act in each was to defraud an insurer.

II. Evidence that the prisoner had insured was properly allowed, as showing the intent, which can never, in such cases, be as satisfactorily inferred from the mere act itself as from other circumstances additional to the act.

III. The certificate of the Rutger's Insurance Company was proved sufficiently by the secretary of the company; the counsel for the prisoner made no specific objection to it, only that it was inadmissible under the indictment for arson in the first degree. He did not object at the trial, as he did in the argument before us, that there was an absence of any proof that the certificate had ever been in the possession of the prisoner, or its existence known to him. With regard to the policy of the Wall street Fire Insurance Company, which was annexed to the certificate, the objection taken was, that its execution had not been specifically proved. This would seem to be the most plausible objection in relation to the admissibility of these papers; but we cannot tell from what appears in the bill of exceptions, whether it was a distinct and separate instrument, requiring additional proof of its execution, or whether it was merely referred to in the certificate, and constituting a part of it. At all events, the latter was the contract of insurance, upon which it may be well supposed that the assured relied; and proof of that alone was sufficient to justify the jury in inferring the criminal intent. They, no doubt, would have inferred it, whether the original policy had or had not been introduced. The prisoner could not, therefore, have been possibly injured, even if proof of its execution, as an independent document, was necessary. But as it was annexed to the certificate, and was referred to by that instrument, the execution of which was sufficiently proved, further proof of the execution of the policy does not appear to have been necessary.

The other exceptions are all clearly untenable.

The judgment should be affirmed.

SUPREME COURT. Dutchess General Term, May, 1861. *Emott, Brown and Scrugham, Justices.*

GEORGE W. LAMBERTSON, plaintiff in error, *v.* **THE PEOPLE**, defendants in error.

Form of an indictment for the crime against nature.

The allegation that the defendant "had a venereal affair" is not indispensable in an indictment for the crime against nature. The omission may be supplied by an allegation of "carnal knowledge," or some other equivalent allegation. In empanneling a jury for the trial of a felony, at the Oyer and Terminer in the county of Kings, it is not erroneous for the court, after failing to get a jury from the thirty-six jurors summoned for the first six days of the court, under the special act of April 17, 1858, applicable to that county, to refuse to summon taleamen, and to proceed to complete the jury from the thirty-six jurors summoned for the next six days of the court.

AN indictment for the crime against nature was found in the Court of Sessions for Kings county, against George W. Lambertson, in the following words:

Kings County, ss:

The jurors of the People of the State of New York, in and for the body of the county of Kings, upon their oath present, that George W. Lambertson, now or late of the city of Brooklyn, in the county of Kings aforesaid, on the fifteenth day of January, in the year of our Lord one thousand eight hundred and sixty, at the city and in the county of Kings aforesaid, in and upon the body of Peter Cohen, in the peace of God and of the said people, then and there being with force and arms, did feloniously make an assault, and him, the said Peter Cohen, then and there feloniously, wickedly, diabolically, and against the order of nature, carnally knew, and then and there feloniously, wickedly and diabolically, and against the order of nature, with the said Peter Cohen, did commit and perpetrate the detestable and abominable crime of buggery, against the statute in such case made and provided, to the evil example of all others in like case offending, and against the peace of the People of the State of New York, and their dignity.

JOHN WINSLOW, *District Attorney.*

The defendant pleaded not guilty, and the issue came on for trial in that court, on the 15th of February, 1860.

When the district attorney moved on the trial, the prisoner, by his counsel, asked that the panel of jurors be called, and it was done by the clerk, under the direction of the court. Only thirty-four jurors answered to their names, and the counsel for the prisoner then requested that the names of the full panel be put into the jury box. The court denied the application, and the prisoner's counsel excepted.

The clerk then proceeded to call the jury. After the panel of jurors was exhausted, no jury having been obtained, the counsel for the prisoner insisted that, as a matter of law, the residue of the said jury should be summoned, as talesmen, by the sheriff of the county. But the court decided that the first class of jurors having been exhausted, the names of the second class of jurors who were present, and had been summoned by the commissioner of jurors as required by the statute, should be put into the jury box, to which decision the prisoner's counsel excepted.

The counsel for the prisoner then requested that the panel of jurors for that term of the court, be produced and read, which was done, when the counsel for the prisoner moved to set aside the panel by way of challenge, upon the following grounds:

1. That it did not appear by the proof of service that the jurors were notified by the commissioner, on at least three days' previous notice.
2. That the numbers opposite the names of the jurors, were not in conformity to the statute.

The court denied the motion, to which decision the prisoner's counsel excepted.

The court then directed the clerk to deposit the names of the second class of jurors in the jury box, and the clerk drew enough additional jurors to complete the jury.

The prisoner's counsel then moved the court to confine the testimony on the part of the prosecution, to a simple assault and battery, on the ground that the indictment was defective

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in not describing the offense with more particularity. The motion was denied, and the prisoner's counsel excepted.

After hearing the evidence, the jury found a verdict of guilty:

The prisoner's counsel then moved in arrest of judgment on the grounds that the indictment was defective, because it did not state, with particularity, the place where the offense was committed; because it joined a misdemeanor and a felony in one count; because it did not describe the offense with precision, and because it did not state that the prisoner had a "venereal affair" with Peter Cohen, and because the crime was not designated nor described on the face of the indictment in the words of the statute.

The motion in arrest of judgment was denied, and the court sentenced the prisoner to confinement in the State prison for nine years and six months.

A writ of error was then sued out in behalf of the prisoner, and the record was removed into this court.

N. F. Waring, for the prisoner.

I. The panel of jurors having been exhausted, the defendant was entitled to have talesmen summoned (3 *R. S.*, 5th ed., 718, § 120, 121), and the act organizing the commissioners of jurors in Kings county, does not repeal this section of the act. (*Sess. L.* 1858, ch. 342, § 42, &c.)

The court erred in not setting aside the second panel, for the following reasons:

1. By section eighteen of the act of 1858, the commissioner and the judges must sign a certificate at the end of the list. In this case none was signed.

2. And the court had no right to put into the box the second class of jurors; the jurors' names being all drawn out of the box, the defendant was entitled to have talesmen summoned.

II. The court erred in not confining the testimony of the People to a simple assault and battery, for the reasons referred to on the motion in arrest of judgment.

III. The court erred in not arresting the judgment.

The form of the indictment is laid down in 2 *Chitty's Cr. L.*, 48, and the words, "had a venereal affair," are made part of the indictment, and this form was settled, says Chitty, on great advice. (*East P. Crown*, 480, note A.) When on a youth under age, it must be so stated in the indictment (see form referred to), and when upon a female, it must be so stated.

The indictment has the words, "*contra naturæ ordinem rem habuit veneream et carnaliter cognovit*," and Justice FOSTER says this alone was never thought sufficient. (2 *Foster*, 424.)

John Winslow (District Attorney), for the respondent.

I. The allegations of the indictment are sufficient. The expression "*venereal affair*," adds nothing to the force of the indictment.

The words "*carnal knowledge*," "*carnaliter cognovit*," are essential, and include the meaning of "*venereal affair*," and more. There could be no carnal knowledge which did not include "a venereal affair;" but the latter does not necessarily include the former.

It is said in *Foster* (*Crown Law*, 4231, 4 *Appendix*), that the word "*buggery*" must be used to describe the offense. The indictment conforms to this rule.

II. The omission of the expression, "*venereal affair*," could not, in any sense, tend to the prejudice of the defendant. He could not be prejudiced, for the indictment informed him as to the offense for which he would be tried. (*See statute of Jeoffails, R. S., part 4, ch. 2, title 4, § 52; 3 R. S., 5th ed., 1019, § 54.*)

III. The proceedings of the court in organizing the jury, were correct. It was the duty of the court to draw from the second class, upon the exhaustion of the first, rather than to resort to talesmen.

It is the spirit and purpose of the Kings County Jury Act (*Session Laws, 1858*), to discourage and prevent a resort to talesmen, when regularly drawn jurors are in court ready for service, as they were in this case.

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IV. The objection that the jurors had not received three days' notice, could only be taken by a juror. The provision is for the benefit and protection of the jury. If a juror appears for service in court upon a shorter notice, he may serve.

By the Court, SCRUGHAM, J. There are certain technical words essential to the statement of some offenses in an indictment, and the omission of which would be fatal before or after verdict; as in murder, the word murdered; in rape, the word ravished; and in larceny, "feloniously took and carried away." These are spoken of by Blackstone (4 *Bl. Com.*, 307), as "particular words of art which are so appropriated by the law to express the precise idea which it entertains of the offense, that no other words, however synonymous they may seem, are capable of doing it."

The words usual in indictments for the offense of which the defendant was convicted, and which were omitted in this case, are not words of this character, and the indictment contains all of the words of art required.

Neither is the use of the omitted words essential to make the statement of the offense certain to a certain intent in general, which is all that is required in such pleadings (*Co. Lit.*, 303, a), for all that the pleader should have stated in charging the offense, is expressly alleged or by necessary implication included in what is alleged in the indictment in question, and therefore nothing can be presumed against him by reason of the omission of these words.

The trial of the defendant took place at the term of the Court of Sessions of Kings county, appointed to be held on the first Tuesday of February, 1860, under the act in relation to jurors, and to the appointment and the duties of a commissioner of jurors, in the county of Kings, passed April 17, 1858. One hundred and forty-four jurors had been drawn to serve at that term of the court, and pursuant to section twenty-three of that act the thirty-six jurors first drawn had been notified to be present on the first six days of said term, and

the thirty-six jurors next drawn had been notified to be present on the second six days of said term.

In empanneling a jury for the trial of this indictment, the names of all of the jurors in attendance, who had been notified to attend for the first six days of the term, were exhausted before a full jury could be obtained, and the court directed that the panel should be completed by putting in the box the names of the jurors who had been notified to attend for the second week of the term, and who were present.

It is now urged that this was error, and that the court should have directed the sheriff to summon talesmen.

Trials of fact by jury, in every court of common law jurisdiction, must be had by jurors drawn, summoned and returned in the manner directed by statute (in the county of Kings in the manner specially directed in the act referred to), provided a sufficient number of such jurors can be obtained.

It is the object of the law to secure, in all cases, persons to serve as jurors who possess all the qualifications of condition and character specified in the statutes regulating the manner in which jurors are to be selected and returned, and of these qualifications in respect to the persons returned, the town or ward officers who are charged with the duty, and to whom such persons are likely to be personally known, can more deliberately, and doubtless more correctly judge, than can the sheriff, in respect to talesmen, whom he must summon in haste from bystanders or others, with whom in many instances he is not acquainted, and of whose qualifications he will be too apt to judge by personal appearances, and from only such information as he may in his haste find it convenient to obtain.

From these considerations, and because the practice admits of great abuse, and renders it comparatively easy for interested and unscrupulous persons to get upon juries, the necessity for summoning talesmen is always to be avoided if possible.

This necessity only arises when a sufficient number of jurors duly drawn and summoned do not appear and cannot be obtained, and it certainly did not exist in this case, for the jurors who were notified to appear for the second six days

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were jurors duly drawn, and summoned to attend that term of the court, and they did appear and were obtained.

It is true that, under their notice, they were not obliged to appear until the second week of the term, but this division of the jurors is intended only for the convenience of themselves and of the court. They are jurors, not of the week but of the term; and this is shown, not only by their being drawn as such, but also by the provision in § 23 of the act for allowing their days of service to be changed.

The judgment should be affirmed.

SUPREME COURT. Broome General Term, May, 1862. *Balcom, Campbell, Parker and Mason*, Justices.

WILLIAM W. GOODELL, plaintiff in error, v. THE PEOPLE, defendants in error.

The statutory provision (2 R. S., 288), which declares it a misdemeanor for an attorney, counselor or solicitor, to buy any bond, bill, promissory note, bill of exchange, &c., with the intent, and for the purpose of bringing any suit thereon, is not applicable to a demand purchased with the intent of prosecuting it in a justice's court.

THIS case came up on a writ of error to the Court of Sessions of Madison county. The plaintiff in error had been indicted in that court for a violation of the provisions of the statute (2 R. S., 288), which forbids the buying of demands for the purpose of prosecution. He pleaded that he received the note, &c., without any intent to prosecute it in a court of record. The public prosecutor demurred, because it did not deny an intent of prosecuting it in a justice's court. Judgment on the demurrer was given in favor of the People, and Goodell sued out a writ of error.

M. J. Shoecraft, for the plaintiff in error.

A. N. Sheldon (District Attorney), for the People.

CAMPBELL, J. The simple question is this: is it an indictable offense for an attorney of this court to buy a promissory note, with the purpose or intent to prosecute the same in a justice's court?

The present language of the statute is this (*p.* 478, § 58, 3 *R. S.*, 5th ed.): "No attorney, counselor or solicitor, shall, directly or indirectly, buy, or be in any manner interested in buying any bond, bill, promissory note, bill of exchange, book debt, or other thing in action, *with the intent* and for the purpose of bringing any suit thereon."

The statute of 1818, which was entitled "An act to prevent abuses in the practice of the law, and to regulate costs in certain cases," decided "that no attorney or counselor-at-law of any court of record in this State, shall, directly or indirectly, buy, &c., any promissory note." Under this statute, it was said in *People v. Walbridge* (6 *Cowen R.*, 516), "the act of buying constitutes the offense." That the law of 1818, and previous laws on this subject, were intended to reach a class of men who make a practice, either directly or indirectly, of buying small notes of fifty dollars and upwards, and then prosecuting them in courts of record, in the old common pleas, or in the Supreme Court, and make the defendants pay large bills of costs, even when the suit was undefended, there can be, I think, no doubt. Hence, it was entitled an act to prevent abuses, and to regulate costs. The law was aimed at attorneys in courts of record, who were the parties receiving the costs, and who thus often oppressed debtors by unexpected and unnecessary prosecutions. But the statute of 1818 did not reach another court and another class of officers who were also charged with oppression, namely: the courts of justices of the peace and the constables who serve process issuing out of such courts. Accordingly, in 1820, another statute was passed, and closely following that of 1818, found now in 3 *R. S.*, 454, 5th ed., § 161. That statute declares that "no justice of the peace or constable shall, directly or indirectly, buy, or be interested in buying any bond, note, or other demand or cause of action, for the purpose of *commencing any suit thereon before*

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a justice, &c.;" also, as in case of attorneys and counselors, making it a misdemeanor. These two statutes covered the whole ground of abuse and costs in what may be called common law courts. It placed the restraining hand on the attorneys and counselors who were entitled to costs in courts of record, and upon justices and the constables who were entitled to costs in courts of justices of the peace, and solicitors in chancery were afterward added. The statute, in relation to justices' courts, was passed in 1820, after the statute of 1818, relating to attorneys and counselors, and adopts the language of the act of 1818, and meets and provides for correction of abuses that may have crept into justices' courts. Reading the two acts together, and looking at the title of the act of 1818, there can be no doubt, I think, that that act and the subsequent alterations and provisions, were intended to prevent abuses practiced by attorneys in the courts of record. The attorney may not buy a note, with the intent and for the purpose of bringing any suit thereon. Of bringing a suit where? Why, clearly in some court of record, where he recovers costs. So the justice and the constable may not buy for the purpose of prosecuting in a court where they are entitled to fees and costs. The act of the defendant charged as an offense, may be within the letter of the law; but, in my judgment, it is not within its spirit. It may be noted, too, that there is no such officer as attorney or counselor-at-law known in the courts of justices of the peace; the statutes nowhere provide for such. I think the defendant's plea was good, and the demurrer should be overruled and the judgment of the Court of Sessions reversed.

PARKER, J. In this case, the judgment of the Madison County Court of Sessions, upon a demurrer interposed by the People to the special plea of the defendant, is brought here by writ of error for review; and the question presented is, whether the statute which forbids the buying of promissory notes, &c., by attorneys, counselors and solicitors, with intent to bring suits thereon, was intended to apply to and include suits in justices' courts.

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The defendant, being an attorney and counselor of this court, was indicted for a violation of that statute. He pleaded, in substance, that he received the note in payment for property sold, without any intent to bring any suit thereon in any court of record. The district attorney, on behalf of the People, demurred to the plea, because it does not deny that the note was received with intent to prosecute the same in a court of a justice of the peace. The indictment alleged that the defendant bought the note "with the intent and for the purpose of bringing a suit thereon," using the language of the statute. If that language in the statute was intended to include suits in justices' courts, the plea is not broad enough, and the demurrer is well taken; but if suits in justices' courts are not within the prohibition, the plea is good in substance, and the demurrer should have been overruled, and judgment thereon given for the defendant.

I am of the opinion that the statute in question does not reach this case; that the prohibition extends only to the buying of notes, &c., "with the intent and for the purpose of bringing suits thereon" in courts of record.

In the first place, the article of the Revised Statutes, in which the prohibition is found, is entitled, "Of the officers of courts of record, their duties, privileges and liabilities" (2 R. S., 288, 1st ed.); and then the whole scope of the article is in conformity with the title, and contemplates merely the duties, privileges and liabilities of officers of courts of record with reference to proceedings in such courts. This, I think, will be evident to any one reading the several provisions of the article. It begins with declaring that "all attorneys, solicitors and counselors shall be regulated by the rules and orders of the courts in which they shall respectively practice." It goes on to provide for the admission of attorneys, &c.; proceedings on the death of an attorney or solicitor; prescribes penalties for deceit, willful delay, extortion, and lending his name, by an attorney or solicitor, in the prosecution of suits. So far, there will be no dispute but that the acts prescribed and inhibited, and the suits mentioned, are acts and suits in courts of

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record. Then comes the section containing the prohibition in question; it is as follows: "§ 71. No attorney, counselor or solicitor shall, directly or indirectly, buy, or be in any manner interested in buying, any bond, bill, promissory note, bill of exchange, book debt, or other thing in action, with intent, or for the purpose, of bringing any suit thereon."

By the seventy-third section the doing of the act above prohibited is declared a misdemeanor, and the penalty, fine and imprisonment, and removal from office in the several courts in which the guilty party is licensed. Subsequent sections provide for setting up as a defense "in any suit" brought on a note, &c., bought in violation of this statute, the fact that it was so bought, and for compelling the plaintiff to testify touching that fact. Section seventy-seven authorizes the defendant to apply to a judge of the court in which the suit is pending, or to some officer authorized to exercise the powers of a justice of the Supreme Court at Chambers, for an order that the plaintiff attend the trial of the cause to be examined. Section seventy-nine provides that such order shall be served on the plaintiff or his attorney at the time of serving a plea tendering an issue in the cause. Section eighty provides that if the plaintiff fails to attend the trial, he shall be nonsuited, unless his failure is accounted for to the satisfaction of the court, in which case the court may postpone the trial until its next sitting.

It is plain that none of these provisions are applicable to a suit in a justice's court, and yet they are all made applicable to *any suit* brought on a demand procured in violation of the provisions of this article. It seems to me to follow that suits in justices' courts are not contemplated by the article, nor included in its prohibition; and consequently, that a note bought with intent to bring a suit upon it in a justice's court, is not forbidden by it.

The fact that there is a similar prohibition in one of the articles of the Revised Statutes, relating to justices' courts, by which justices and constables, the only officers of those courts, are prohibited from buying notes, &c., for the purpose of com-

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mencing any suit thereon before a justice of the peace, strengthens the position that the section under consideration was not intended to apply to suits in justices' courts. (2 R. S., 267, § 235, 1st ed.)

Again, if we consider the object of the statute, I think we shall be led to the same conclusion. The Chancellor, in *Baldwin v. Latson* (2 Barb. Ch. R., 308), states the object to be "to prevent attorneys and solicitors from purchasing debts or other things in action for the purpose of obtaining costs by a prosecution thereof." So Mr. Justice STRONG, in *Mann v. Fairchild* (14 Barb. R., 554), says: "The main object of the statute in question was to prevent litigation by prohibiting the purchase of choses in action by those whose pecuniary interests might be peculiarly advanced by instituting suits upon them, and who, in consequence of their position, might conduct their suits upon unequal terms." It is evident, I think, that the object of the statute is correctly stated in these two cases. The purchasing of debts by attorneys, with the intent to bring suits upon them in justices' courts, does not seem to me to be within the mischief which the statute was intended to guard against. No costs being allowed to an attorney in a justice's court, he has no object in buying debts to sue in that court, and I can see neither opportunity nor temptation for him to attempt to advance his pecuniary interests by so doing. As he has no temptation to litigate, as a party, in justices' courts, no litigation is induced by his freedom from restraint in that direction; and I conclude, therefore, that the prohibition of the statute was not intended to restrain him from acts which are not productive of the evils which it was intended to remedy. Upon the whole, I am of the opinion that the judgment of the court below was erroneous, and should be reversed.

Judgment reversed.

SUPREME COURT. Erie General Term, February, 1862. *Davis, Grover and Hoyt*, Justices.

JAMES S. KUCKLER, plaintiff in error, *v.* THE PEOPLE, defendants in error.

The provisions of the act of April 14, 1860, entitled "An act in relation to capital punishment, and to provide for the more certain punishment of the crime of murder," so far as they apply to offenses committed before the act took effect, are *ex post facto*, and, therefore, unconstitutional and void.

Where a conviction had taken place under that act, for an offense committed before the act took effect, and sentence had been pronounced by the Court of Oyer and Terminer, in pursuance of the provisions of the act, no bill of exceptions having been returned with the record, and the only error committed having been in the giving of judgment, it was held, on reversing the judgment, that this court had no power to order a new trial, but that the prisoner must be discharged.

To grant a new trial, in such a case, would be a violation of the constitutional provision which protects the prisoner from "being twice put in jeopardy for the same offense," and on the second trial the plea of *autrefois convict* would be a good defense.

THIS case came up on a writ of error to the Court of Oyer and Terminer of the county of Erie. No bill of exceptions was returned with the record. The questions arising in the case are sufficiently stated in the opinion of the court.

E. Cook, for the plaintiff in error.

F. J. Fithian (District Attorney), for the defendants in error.

By the Court, DAVIS, J. Before the passage of the act of April 14th, 1860, entitled "An act in relation to capital punishment, and to provide for the more certain punishment of the crime of murder," James S. Kuckler, the plaintiff in error, committed murder by poisoning his wife. He was indicted, and after that act went into effect was tried and convicted, and sentenced to be imprisoned and executed, pursuant to its provisions. It is now established by the Court of Appeals, in *Hartung v. The People* (22 N. Y., 95), that the provisions of the act under which judgment was pronounced on the plaintiff in error, in so far as they apply to offenses

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committed before that law became operative, are *ex post facto*, and therefore unconstitutional and void. This determines, without further discussion, that the judgment in this case is erroneous, and must be reversed.

The important question then arises, what disposition should be made of the case upon the reversal of the judgment?

The trial of the prisoner and his conviction were in all respects regular and legal, and no exceptions to them are brought before us. The writ of error has brought up the record alone, and no question is made except upon the illegality of the judgment pronounced upon a proper conviction. Untrammelled by statutes or decisions, there would seem to be no difficulty in holding that the true course in such a case would be, on reversing the erroneous judgment, to direct the court below to pronounce the proper judgment on the conviction. So far as we have decisions on this question, they are based on the English cases, without pausing to inquire whether those cases are applicable to our system or not. In *Quimbo Appo's Case* (19 N. Y., 531), it is settled that the Oyer and Terminer of the several counties of this State "is a permanent and continuous court, and its successive sessions are terms of the same and not of distinct tribunals," and the difference between it and the English Courts of Oyer and Terminer, which are held by virtue of special commissions from the Crown, which expire with each session, is very clearly shown. When, under the English system, a judgment was reversed on writ of error, because the Oyer and Terminer had given an illegal judgment upon a regular conviction, there remained no court below which could be directed to pronounce the proper judgment. It is not so with us, and, therefore, the reason for the rule failing, the rule itself is not applicable, and never ought to have been brought into our practice.

But while the decisions would not have restrained us from directing the Oyer and Terminer to proceed to give the proper judgment in this case, the provisions of the statute, regulating the practice on writs of error in such cases, must be respected. The statute provides (2 R. S., 741, § 24) that, "if the Supreme

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Court shall reverse the judgment rendered, *it shall either direct a new trial, or that the defendant be absolutely discharged*, according to the circumstances of the case.

One of the alternatives of this statute—*either to direct a new trial, or to discharge the defendant absolutely*—must be pursued, and this necessarily precludes us from directing the court below to proceed to the proper sentence; and relieves us also from inquiring whether there was any sentence that could have been lawfully pronounced, left by the blind and sweeping changes of the act of 1860. The question for our examination is therefore narrowed to this: Can we direct a new trial, or must the prisoner be absolutely discharged? It is insisted by the counsel for the plaintiff in error, that it is authoritatively settled in this State, that where the writ of error brings up the record alone, without a bill of exceptions, and the judgment is reversed for error manifest in the record, this court cannot order a new trial, but must discharge the prisoner absolutely. Before bills of exceptions were extended by statute to criminal cases, the court had no power to grant new trials in cases of felony and treason, where the proceedings appeared by the record to have been regular. Neither the merits nor the proceedings in the progress of the trial were reviewable on writ of error. (*People v. Comstock*, 8 Wend. R., 549; 8 Black. Com., 388; 13 East R., 416; *Chit. Crim. Law*, 532.) This rule of the common law has been followed since our statute, and it has been said that new trials can be granted now only where the judgment is reversed upon bill of exceptions. (*People v. Taylor*, 8 Denio R., 91; *O'Leary v. People*, 4 Park. Cr. R., 198.) In the *People v. Taylor*, the point was not at all involved, and the very eminent judge who pronounced the opinion, was evidently only stating the common law rule, without respect to any statute. He neither referred to the statute, nor in any wise considered its effect upon the former rule, and ought not to be regarded as holding, in his merely incidental *dictum*, that the statute had not changed the common law. In *O'Leary v. The People*, the court, so far as this point was considered, followed the *People v. Taylor*, without

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considering the question in the light of the statute. In *Hartung's Case*, the Court of Appeals (as the reporter informs us in notes), on reversing the judgment, ordered a new trial, "not being able judicially to see that, upon a new trial, the prisoner might not be convicted of manslaughter in some inferior degree." A bill of exceptions was, in that case, annexed to the record, but no error was found in the bill, and the judgment was reversed solely because of the effect of the law of 1860 on the case. It would be impeaching the good sense of that court to say that, in a case where no error appeared in the bill of exceptions, it held it to be proper to grant a new trial for error found only in the record, simply because a bill was attached to the record. It must have been considered that the statute had given the court power to order a new trial "according to the circumstances of the case," and in that respect had changed the common law rule, or, which is possible, the order was entered without considering this point at all. In either view, the case is perhaps not to be considered as an authority on this question.

The statute in plain terms embraces *all criminal cases* brought before the court by writ of error, whether the alleged error is in the judgment record or in a bill of exceptions annexed to it, and, in my opinion, the true test to determine what order shall be made on a reversal, is whether a new trial can be legally effective or not. It is sometimes apparent on the record that no conviction can lawfully be obtained, as where the indictment is fatally defective, or where the circumstances are such that the prisoner cannot be retried without a violation of his constitutional or legal rights; and in all such cases it is the duty of the court to discharge the prisoner absolutely; but where the error, though apparent in the record only, is of a character that renders *the trial and conviction* illegal, so that the prisoner cannot legally be said to have been in jeopardy, the statute, in my judgment, authorizes this court to order a new trial.

But in the case at bar the conclusion is forced upon my mind that there can be no new trial. The trial and conviction

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that have taken place were in all respects regular and legal. When the verdict was rendered the prisoner stood lawfully convicted of murder. (4 *Black. Com.*, 362.) The legislature (to that purpose omnipotent, both in wisdom and folly) had repealed all statutes prescribing his sentence and punishment, under circumstances where the common law was not revived. (*Hartung v. People*, 22 *N. Y. R.*) The sentence attempted to be substituted was unconstitutional; and we are compelled, by reverence for the Constitution, as well as for the adjudication of the Court of Appeals, to reverse it. But the legal conviction upon a regular trial remains a *fact*, of which the prisoner is entitled to avail himself.

His plea of *autrefois convict* would be a bar to a new trial, and would, as it seems to me, be established by producing the record now brought before us. "The plea of *autrefois convict* or a former conviction for the same identical crime, though no judgment was ever given or perhaps will be (being suspended by the benefit of clergy or other causes), is a good plea in bar to an indictment." (4 *Black. Com.*, 386.) In *The State v. Benham* (7 *Conn. R.*, 414), it was held that the verdict itself constitutes the bar; and in *The State v. Morrell* (2 *Yerg. R.*, 24), that this is so even when the judgment is improperly arrested upon a good indictment. (2 *Cow. & Hill's Notes*, 955.)

The prisoner could not be deprived of the benefit of that plea by the answer that the judgment pronounced on the conviction was illegal. It was no fault of his that the legislature had deprived him of his well earned deserts — to be hanged; nor that the court, obedient to the letter of the act, pronounced the sentence it prescribed.

It is a familiar maxim of the common law, "*Nemo debet bis vexari pro eadem causa.*" This maxim is embodied in the Constitutions of this State and of the United States. The former declares that no person shall be subject twice to be put in jeopardy for the same offense (sec. 6, art. 1, *Const. of N. Y.*); the latter, "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb." (Art. 5, amend. *Const. U. S.*) It needs neither argument nor authority

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to show that these provisions are applicable to a case where, upon a regular trial, there has been a lawful conviction of a felony. They protect the prisoner from another trial; and the result, under the statute, is his absolute discharge.

To discharge the prisoner, so justly convicted of his appalling crime, is a most painful duty; but in our view, the law leaves us no alternative. If the result in his case, and in the parallel one of Mrs. Hartung—in one of which a faithful wife, in the other a confiding husband, was deliberately poisoned to death, to give scope to the embraces of a paramour and prostitute—shall prove beacons to warn against future imitations of the folly and stupidity of the act of 1860, they will not be wholly without benefit to the community.

SUPREME COURT. New York General Term, May, 1862.

Ingraham, Leonard and Rosekrans, Justices.

JOHN A. CANTOR, plaintiff in error, v. THE PEOPLE, defendants in error.

Forn of an indictment for forgery in passing a counterfeit bank bill after a previous conviction for a similar offense.

On the trial of an indictment for forgery in passing a counterfeit bill, it had been proved, without objection, that after the prisoner and B, his companion, had been arrested and brought to the station house, a boy came in and produced a roll of sixteen counterfeit bank bills, which he said B. threw away when in the company of the prisoner, while they were in custody on their way to the station house. Afterward the public prosecutor offered to put such counterfeit bank bills in evidence, but the evidence was objected to by the prisoner's counsel. *Held*, that it was still in time to object to the introduction of the bills in evidence, notwithstanding the hearsay evidence of the boy had been received without objection; and the counterfeit bills having been received in evidence, and the prisoner found guilty, the conviction was reversed and a new trial ordered.

THIS case came up on writ of error to the N. Y. General Sessions. On the 23d day of October, 1861, the prisoner was indicted in that court, in the words and figures following:

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City and County of New York, ss:

The jurors of People of the State of New York, in and for the body of the city and county of New York, upon their oath, present:

That heretofore, to wit, at a Court of General Sessions of the Peace, holden in the city of New York, in and for the city and county of New York, on the sixth day of July, in the year of our Lord one thousand eight hundred and fifty-three, before WELCOME R. BEEBE, Esquire, city judge and justice of the said court, assigned to keep the peace of the said city and county of New York, John A. Cantor, by the name and description of Charles Day, was, in due form of law, tried and convicted of forgery upon a certain indictment then and there depending against the said John A. Cantor, by the name and description aforesaid; for that the said John A. Cantor, on the eighteenth day of June, in the year of our Lord one thousand eight hundred and fifty-three, at the city of New York, in the county of New York, aforesaid, with force and arms, feloniously had in his custody and possession, and did receive from some person or persons to the jurors aforesaid unknown, a certain false, forged and counterfeited negotiable promissory note, for the payment of money, commonly called a bank note, purporting to have been issued by a certain corporation or company, called Bank of Hallówell, duly authorized for that purpose, by the laws of the State of Maine, which said last mentioned false, forged and negotiable promissory note, for the payment of money, is as follows, that is to say:

"2.

No.

2.

The President, Directors and Company of the BANK OF HALLOWELL promise to pay Two DOLLARS to S. Ford, or bearer, on demand.

Hallowell, April 1, 1853.

Two.

A. LEONARD, Pres't. Two

A. S. WASHBURN, Cash.

State of Maine."

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With intention to utter and pass the same as true, and to permit, cause and procure the same to be so uttered and passed, with the intent to injure and defraud one John Lawitz and divers other persons to the jurors aforesaid unknown, he, the said John A. Cantor, then and there well knowing the said last mentioned false, forged and counterfeited promissory note, for the payment of money, to be false, forged and counterfeit, as aforesaid, against the form of the statute in such case made and provided, and against the peace of the People of the State of New York and their dignity; and, therefore, it was considered by the said court then, that the said John A. Cantor, otherwise called Charles Day, should be imprisoned in the State prison for the term of eight years, as by the record thereof doth more fully appear. And the jurors aforesaid, now here sworn upon their oath aforesaid, do further present, that the said John A. Cantor, otherwise called Charles Day, having been so convicted of forgery, and having been duly discharged and remitted of such judgment and conviction, afterward, to wit, on the 20th day of July, in the year 1861, with force and arms, at the ward, city and county aforesaid, feloniously had in his possession a certain forged and counterfeited negotiable promissory note, for the payment of money, commonly called a bank note, purporting to have been issued by a certain corporation or company called The Mechanics' Bank, duly authorized for that purpose, by the laws of the State of Connecticut, which said last mentioned forged and counterfeited negotiable promissory note, for the payment of money, is as follows, that is to say :

"5.

No. 1198.

5.

THE MECHANICS' BANK,

STATE OF CONNECTICUT,

Promise to pay five dollars to the bearer, on demand.

New Haven, Dec. 8, 1858.

V.

JNO. W. FITCH, Pres't.

Geo. B. CURTIS, Cash."

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With intention to utter and pass the same as true, and to permit, cause and procure the same to be so uttered and passed with the intent to injure and defraud one Bernard Sweeny and divers other persons to the jurors aforesaid unknown, he, the said John A. Cantor, otherwise called Charles Day, then and there well knowing the said last mentioned forged and counterfeited promissory note, for the payment of money, to be forged and counterfeited as aforesaid, against the form of the statute in such case made and provided, and against the peace of the people of the State of New York and their dignity.

NELSON J. WATERBURY, *District Attorney.*

On the 12th day of November, 1861, the defendant was arraigned in said court on said indictment, and pleaded not guilty.

The issue so joined came on to be tried on the nineteenth day of November, 1861, in said court, before JOHN H. McCUNN, city judge, and a jury.

Barnard Sweeny was called as a witness on behalf of the prosecution, and testified as follows: On the 20th day of July, 1861, I lived at 277 Division street; I saw defendant there in the liquor store which I attended; another man named Burns came in with him; it was in the evening; they called for two milk punches and two segars, and defendant gave in payment a five dollar bill on the Mechanics' Bank, New Haven, Connecticut; I gave him four dollars and seventy cents in change, retaining thirty cents for the drinks and segars. (A bank bill was here shown to witness.)

Q. Is that the bill?

A. I think it is; I wrote my name on it; these two parties were in there eight or ten minutes; as soon as they went out police officer O'Rourke came in and asked me if they (defendant and Burns) had passed any bill there; defendant was not present; I showed the officer the bill; he said it was bad; he took the bill and went after the prisoner; all this occurred within a minute or two after they went out; this was about eight o'clock in the evening.

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Cross-examined: It was on a Saturday night; the parties did not appear as if they had been drinking; when I took the bill I put it in the drawer; I had other bills in the drawer, but no others of the denomination of five dollars; when defendant and Burns left, they had hardly time to cross the street when O'Rourke and the other officer came in, and I gave them the bill; I was not present at the examination of the defendant before the police Magistrate.

The district attorney hereupon read in evidence a certificate of Henry Vandervoort, clerk of said Court of General Sessions, in the words and figures following:

"At a Court of General Sessions of the Peace, holden in and for the city and county of New York, at the city hall of said city, on Wednesday, the 26th day of July, in the year of our Lord one thousand eight hundred and fifty-three:

Present—The Honorable WELCOME R. BEEBE, City Judge of the city of New York, Justice of the Sessions.

The People of the State of New York v. Charles Day, <i>alias</i> John A. Cantor.	}	On conviction, by verdict, of forgery in the second degree.
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Whereupon it is ordered and adjudged by the court, that the said Charles Day, alias John A. Cantor, for the felony aforesaid whereof he is convicted, be imprisoned in the State prison at hard labor for the term of eight years.

A true extract from the minutes.

HENRY VANDERVOORT, *Clerk.*"

Bernard O'Rourke was called as a witness on behalf of the prosecution, and, after being duly sworn, testified as follows: I am a police officer; I arrested the defendant on the evening of the 20th of July last; I went to the place of the last witness (Sweeny), and inquired if the defendant had passed any bill there; Sweeny said he had; I got a five dollar bill and took it to the station house; Sweeny came up and marked it at the station house; I put it in my pocket; it was the same bill

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I got from him; I saw him mark it; he wrote his name on it. (The bill was here shown witness.) That is it; on Saturday evening I was on duty in Division street; my attention was called to a crowd in front of the grocery store; I saw Rutzky come out of there; I thought there was a quarrel; there was no noise there; I saw a girl cross over; my attention was called to her; I saw defendant come out of Rutzky's clothing store and go down Division street on the Seventh ward side; Rutzky had been to Bohde's grocery store; I followed defendant ten or twelve blocks, and into the house No. 277 Division street; he was alone; he remained there forty or forty-five minutes; I was watching with another officer outside; I went over into the house, but could not see him; I came back to where I started from, and after having waited forty or forty-five minutes he made his appearance in company with Frank Burns; the house defendant went in was not Sweeny's place; I am not sure about the number of the house; this was the house where Burns lived; Burns' house is three or four blocks this side of Sweeny's liquor store; defendant went two or three streets up and into Sweeny's liquor store; defendant and Burns went in together; I and the other officer stood on the other side, watching them; we could see all their movements; I saw defendant put his hand in his pocket to pay for the drinks; the minute defendant and Burns came out of Sweeny's, I went in; Sweeny was the only person in the store; I asked him what money he had received from those two men; he replied, a five dollar bill; I said, "Are you sure it is a good bill?" I told him the bill was bad; I took the bill and followed defendant and Burns until I met officer Van Duzer, and we arrested them and took them to the Thirteenth ward station house; I took the bill out of my pocket and gave it to the captain; Van Duzer searched defendant; he had the money he received from Sweeny, a three dollar bill, a one dollar bill, and seventy cents in silver; I think defendant said that was the money he received for a five dollar bill he gave Sweeny; Van Duzer also found on defendant four tens (good money) done up in small bits of paper; the captain asked him where

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he got the money; he said he got it down town from some friends; we searched him thoroughly, but found no more there; he evaded all questions; he said he was born nowhere; captain Steers desired me and Van Duzer to take them in the back room; we did so; I then searched defendant, and in his left fob pocket of his pantaloons I found one dollar in gold, two half dollars and two or three ten cent pieces, a five cent piece, I think, amounting in all to about two dollars and twenty-five cents; found no more on his person; I searched him thoroughly; found nothing on Burns; a boy belonging to some regiment brought in a roll of bills which he had picked up; he brought it in while I was searching defendant; he said he picked it up in the street; he said one of the prisoners threw it away; he said he was not positive which one it was, but thought it was the big man (Burns); I took Burns, and Van Duzer took defendant, to station house.

The district attorney hereupon put to the witness the following question:

"On the way to the station house, did you observe Burns do or say anything, and, if so, what?"

The counsel for defendant objected to this question. The court overruled the objection, and allowed the question to be put; to which decision counsel for defendant excepted.

The witness answered: "He put both his hands in his pockets, one in his pantaloons and the other in his coat pocket; I saw him make a motion as if to throw away a segar; I afterwards saw the segar in his mouth."

The district attorney here proposed to give in evidence the declarations of Burns in the presence of defendant. Counsel for defendant objected. The court overruled the objection, and allowed the evidence to be given; to which counsel for defendant excepted:

"Burns asked me what he was arrested for? what he had done? I told him if he would go to the station house he could find out. I found nothing on Burns, on searching him. All the money was found on defendant."

The district attorney hereupon handed to the witness some

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sixteen bank bills, which were admitted to be counterfeit, and asked the witness the following question :

"State if this is the money that was brought in the station house by the boy?"

The counsel for the defendant objected to the question. The court overruled the objection, and allowed the question to be answered; to which counsel for defendant excepted.

The witness thereupon answered: "This is it; it was rolled up in this tin foil."

The district attorney hereupon put in evidence the five dollar bank bill which the witness Sweeny testified that defendant passed upon him on the evening of the 20th of July, 1861, which was admitted by the defendant's counsel to be counterfeit; which bill is the same described in the indictment.

Cross-examined: From Rutzky's to Sweeny's is about ten or eleven blocks; Rutzky's is 97 Division street; Burns' place is about three blocks from Sweeny's; Rutzky's is near Allen street; Sweeny's place is corner Governor and Division streets; I saw Rutzky when he came out of the grocery store; I knew he went to the grocery store to see if the bill was good; he told me so afterward; he said he went to see if the bill was good; after I arrested defendant I spoke to Rutzky about the bill; until then I never spoke a word to him about a counterfeit bill; I spoke to Rutzky about it for the first time that night immediately after arrest was made, in his own house; defendant was then locked up; no officer spoke to Rutzky about counterfeit bills in my presence; Rutzky had spoken to my side partner about it; Matt. Keough, or Keoll, was my side partner then; I did not see Burns throw away any roll of bills; I saw him throw something away; it was not a seegar; we were then five or six blocks from the station house; boy came in with the roll three or five minutes after us; when Burns threw something away there was a crowd around us, two or three dozen persons or more; I was present when the boy gave in his testimony; he told Judge Steers distinctly, and swore to it, that Burns threw it away; he stated no differently to me; I don't know that Rutzky was told not to tell

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defendant the bill was bad; I never heard of any such plan; never heard it spoken of from time I saw Rutzky come out of the grocery store; I and the other officer watched the defendant; I don't know the other officer's name; I am sure defendant waited in Burns' thirty or forty minutes at least; I did not look at watch; I could form an opinion; I saw the defendant come out of Rutzky's place; he went right down to Burns' place; Burns' place is on same side as Rutzky's, and is between Rutzky's and Sweeny's, but nearer to Sweeny's.

The prisoner's counsel admitted the existence of the bank, as a corporation, by which the bill passed to Sweeny purported to have been issued, and that such bill was counterfeit.

After other evidence had been given, the district attorney proposed to put in evidence the sixteen counterfeit bank bills identified by the witness O'Rourke as those brought to the station house by the boy. Counsel for defendant objected to the introduction of such bills in evidence. The court overruled the objection, and allowed the bills to be put in evidence, to which the counsel for the defendant excepted. The bills were thereupon read in evidence. The sixteen bills were each and all five dollar bills, on the same bank, and same date, as the counterfeit bill described in the indictment, and were all put in evidence. The defendant's counsel admitted the former conviction, sentence and imprisonment, and expiration of sentence, of defendant, as described in the indictment. The prosecution here rested.

After evidence had been given on the part of the defense, the court charged the jury that it was a question of fact for them to decide, upon the evidence, whether the *scienter* was proved. To which the counsel for the defendant excepted.

The jury rendered a verdict of guilty, and the case was then brought into the Supreme Court.

Henry L. Clinton, for plaintiff in error.

I. The court below erred in permitting the sixteen bills, alleged to have been brought into the station house by the boy, on the night of the arrest of defendant, to be introduced in evidence.

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1. If these bills were thrown away by Burns (and there was some testimony tending to show this), what he did after the counterfeit bill had been passed could not bind the defendant, nor was it admissible in evidence against him; although where two or more are jointly engaged in the commission of a crime, the acts of any one (after the concert of action between them is proved) may be given in evidence against the others, yet, after a crime is committed, the acts or declarations of any one are not evidence against the others. Wharton, in his American Criminal Law (4th ed., § 708), correctly states the rule as follows: "When, however, the common enterprise is at an end, whether by accomplishment or abandonment, it is not material, no one is permitted, by any subsequent act or declaration of his own, to affect the others." * * * * * "Thus, on an indictment against A. for concealing a horse thief, knowing him to be such, *it is not competent for the prosecution to give evidence of what the alleged horse thief subsequently confessed in the presence of A., to establish the fact that a horse was stolen.*" Clearly, anything Burns might have said, or any act of his, such as throwing away a roll of counterfeit bills after the offense in question had been committed, could not be evidence against the defendant.

2. There was no proof, but *hearsay*, that the boy had picked up these bills at all, and brought them to the station house. The only proof adduced by the prosecution, on the subject of these sixteen counterfeit bills, before introducing them in evidence, was that the boy said he picked them up, and that one of the prisoners (Burns) had thrown them away. Clearly, the only way to prove that fact (if it were competent evidence) was to call the boy as a witness on the trial. Certainly, it cannot be necessary to cite authorities to show that *hearsay* is not evidence.

II. The prosecution failed to prove the *scienter* or guilty knowledge. The court below erred in refusing so to charge the jury. All the authorities agree that, in a case of this kind, it is incumbent on the prosecution to prove *guilty knowledge*.

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"Where the prisoner is charged with uttering or putting off a forged instrument, knowing it to be forged, *evidence of that guilty knowledge must be given* on the part of the prosecution, and, for that purpose, the uttering or having possession of similar forgeries will be admissible." (*Roscoe's Crim. Ev.*, p. 515.)

"It has already been observed, that the publication of the forged instrument, with *knowledge* of the fact, is made a substantive offense by most of the statutes which relate to forgeries, and in cases of this kind, the knowledge of the fact, or, as it is frequently termed, the *guilty knowledge*, becomes a material part of the evidence." (2 *Russell on Crimes*, 408.)

"Well knowing the same to be forged," &c. This is not capable of direct proof. It is nearly in all cases, therefore, proved by evidence of facts, from which the jury may presume it. Upon an indictment for disposing of and putting away a forged bank note, knowing it to be forged, proof that the defendant has passed other forged notes, if proved by legitimate evidence, raises a probable presumption that he knew the note, for the passing of which he is now indicted, to be forged." (*Arch. Or. Pl.*, 366.)

S. B. Garvin, for defendants in error.

The sixteen bills were properly proved and received in evidence, it being proved, without objection, that the money was thrown away by Burns, a confederate with Cantor.

The charge was right and proper in all respects, and sentence should be affirmed.

By the Court, ROSEKRANS, J. The declaration of the person who brought to the officer who arrested and searched the defendant, the sixteen bills which were offered in evidence by the public prosecutor, that the prisoner had thrown away the bills, and that the person who made the declaration picked them up, was merely hearsay evidence, and did not establish the fact which he alleged. Although such declarations were admitted without objection on the part of the prisoner, his

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subsequent objection to the introduction of the bills in evidence; and to proof that they were the bills said to have been picked up by the person who made the declaration, was proper and timely, and should have been sustained. These bills, in connection with proof that they were counterfeit, furnished the principal evidence of knowledge by the prisoner that the bill passed by him was counterfeit, and thus effected his conviction.

For these reasons the conviction should be reversed, and the case remanded to the Court of General Sessions for a new trial.

A new trial granted.

BROOME OYER AND TERMINER. February, 1862. Before *Balcom*, Justice of the Supreme Court, and *A. D. Freeman* and *N. D. Applington*, Justices of the Sessions.

THE PEOPLE v. JOHN CARPENTER AND OTHERS.

In an indictment for willfully cutting wood or timber upon lands of another, under 2 R. S., 693, § 15, as amended by the Laws of 1851, ch. 182, it is necessary to describe the lot or close on which the trespass was committed; and when this was omitted, the indictment was quashed.

THE prisoners were brought into court and asked to plead to an indictment in the words and figures following, viz.:

"In the Broome County Court of Oyer and Terminer, of the February Term of the year one thousand eight hundred and sixty-two:

"State of New York, Broome County, ss:

"The jurors for the People of the State of New York, in and for the body of the county of Broome, good and lawful men of said county, then and there being sworn and charged, upon their oaths present: That John Carpenter, Tim. Dempsey, *alias* Timothy Dempsey, and Jeremiah Dempsey, otherwise called Jerry Dempsey, late of the town of Binghamton, in the county

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aforesaid, on the first day of November, in the year of our Lord one thousand eight hundred and sixty-one, and on divers days and times between that day and the present time, at the town of Binghamton, in said county, did maliciously, willfully and unlawfully cut down, steal, take and carry away one thousand young forest trees, otherwise called hoop poles, then standing and growing upon certain lands of Thomas W. Waterman, there situate: the same being done feloniously and without the consent of the said Waterman, against the form of the statute in such case made and provided, and against the peace of the People of the State of New York and their dignity.

"G. A. NORTHRUP, *District Attorney*.

"D. S. RICHARDS, *Special District Attorney*."

The defendants moved to quash the indictment, on grounds which sufficiently appear in the following opinion of the court:

D. S. Richards (Special District Attorney), for the People.

Thos. D. Wright, for prisoners.

By the Court, BALCOM, P. J. It is provided by statute, that "every person who shall willfully commit any trespass, by, 1st, cutting down or destroying any kind of wood or timber standing or growing upon the lands of any other, or upon lands belonging to the people of this State; or, 2d, carrying away any kind of wood or timber that may have been cut down, and that may be lying on such lands; shall, upon conviction, be adjudged guilty of a misdemeanor, and shall be punished by imprisonment in a county jail not exceeding six months, or by a fine not exceeding one hundred and fifty dollars, or by both such fine and imprisonment." (2 R. S., 698, § 15; *Laws of 1851*, p. 349; 3 R. S., 5th ed., pp. 978, 974, § 15.)

The lot or close from which the wood or timber in question was cut and carried away, is not described in the indictment. I am of the opinion it should have been described therein, with reasonable certainty. Thomas W. Waterman may have owned or possessed several pieces of land in the town of Binghamton at the time it is alleged in the indictment the offense was com-

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mitted. The lot or close, in which it is claimed the offense was committed, should be described in the indictment so the prisoners may come to the trial prepared to show, if they can, that Waterman neither owned nor had possession of the same, when the wood or timber was cut and carried away, or that they had leave to cut the same; in other words, so they may know the precise charge against them, and prepare their defense thereto. (*People v. Horr*, 7 Barb. R., 9; 3 Archb. Cr. Pl., by Waterman, 505-2; *Biggs v. The People*, 8 Barb. R., 547.)

A form of an indictment is given in Archbold's Criminal Pleading, by Waterman (vol. 3, p. 506), under the English statute, making it a crime to maliciously destroy or damage trees, shrubs, &c., in which the close wherein the tree (alleged to have been cut, rooted up and destroyed) was standing, is not described, except as "a certain pleasure ground of C. D." A form of an indictment, under the same or a similar statute, is contained in Chitty's Criminal Law (3 *Chit. Cr. Law*, 1116), which is as follows, viz.: "That T. S., late of, &c., after the first day of June, in the year of our Lord one thousand seven hundred and twenty-three, to wit, on, &c., with force and arms, at, &c., aforesaid, unlawfully, maliciously and feloniously did cut down and destroy two elm trees in a certain avenue to the dwelling house of one W. S., there planted, and then growing for ornament there (he, the said W. S., then being the owner of the said trees), to the great damage of the said W. S., against the form of the statute, &c., and against the peace, &c."

I have been unable to find any case that holds the lot or close from which the wood or timber is cut and carried away need not be described in the indictment. The description of the close in the forms to which I have referred is not very definite or certain; but those forms cannot be regarded as authority that the close need not be described at all; and I think it should be described with reasonable certainty.

For the foregoing reasons, I am of the opinion the indictment in question is not good, and that the same should be quashed.

Decision accordingly.

MONTGOMERY OYER AND TERMINER, September, 1862. Before
E. H. Rosekrans, Justice of the Supreme Court, *R. H. Cushman*, County Judge, and the Justices of the Sessions.

THE PEOPLE v. RICHARD ROE.

The amendment of the Revised Statutes (*Laws 1860, chap. 271, p. 474*), as to the time within which indictments must be found, applies to offenses committed before its passage, if no indictment had been then found.

It seems, in this State, the statute of limitations, to be available in a criminal case, should be pleaded.

Form of a plea, to an indictment, of the statute of limitations.

THE defendant was indicted at the Oyer and Terminer, in May, 1862, for false pretenses, alleged in the indictment to have been made at Canajoharie in 1850. When he was arraigned, his counsel stated to the court that, under the old practice in civil cases by statute, the defendant could interpose special pleas without an application to and leave by the court, although the old form was used, that "leave of the court" was "first had and obtained;" but as there was no such statute which applied to criminal cases, he desired leave to interpose the statute of limitations, with the plea of not guilty. The court granted leave; whereupon he pleaded not guilty, and also as follows: "*Second.* And the said Richard Roe, in his own proper person, comes into court here, and having heard the said indictment read, by leave of the court first had and obtained, also says, that the said People of the said State ought not further to prosecute the said indictment against him, the said Richard Roe, because he says the said indictment was found and filed on the 15th day of May, 1862, and that the said indictment was not found or filed in the proper, or in any court, within three years after the commission of the offense in the said indictment specified, although during the whole time since the commission of the said offense he has been and now is an inhabitant of and usually resident within the United States. And this he, the said Richard Roe, is ready to verify; wherefore he prays judgment, and that by the court here he

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may be dismissed and discharged from the said premises in the said indictment above specified."

The district attorney demurred to the second plea, and the defendant joined in demurrer.

J. H. Cook (District Attorney), for the People.

The plea does not state, nor is it claimed, that the defendant was three years a resident of *this State* after the commission of the offense and before the indictment was found. He also claims that the statute of 1860, which substituted residence in the United States for residence in this State, did not repeal or alter the Revised Statutes as to an offense committed before its passage.

N. C. Moak, for the defendant.

I. The plea is good in form and substance. Whenever a statute gives a cause of action or defense, it is sufficient, in declaring upon or pleading the statute, to follow the words of the act; and where the court, in construing a statute, has put an interpretation upon it different from the literal import of its language, it will, of course, be bound to give the same interpretation to the same words when used in a declaration or plea founded upon the statute. (*Cole v. Jessup*, 10 *N. Y. R.*, 108, 104.)

II. By the Revised Statutes, as amended by chapter 271 of the Laws of 1860 (p. 474), the indictment must be found and filed within three years after the commission of the offense, except that the time "during which the defendant shall not have been an inhabitant of or usually resident within the *United States*, shall not constitute any part of the said limitation of three years."

III. The proper method of raising the question is by pleading the statute of limitations.

It is true that in *The State v. Roach* (2 *Haywood N. C. R.*, 552), in a case of counterfeiting, the indictment was quashed, in which the day of the month on which the offense was committed was omitted in the indictment.

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So in *State v. Beckwith* (1 *Stewart Ala. R.*, 818), it was held that "a day when a crime was committed must be laid in the indictment; and when the date is left blank, and it does not appear whether the statute of limitations bars the prosecution or not, judgment will be arrested.

So in *McLane v. The State* (4 *Geo. R.*, 835), "where an indictment showed upon its face that it was barred by the statute of limitations, and did not show on its face anything by which the effect of the statute could be avoided, the judgment was arrested."

In this State, however, the rule is different, and although the indictment shows the offense to be barred by the statute, judgment will not be arrested, but the statute must be pleaded and advantage taken of it on the trial. There is considerable question whether the defendant can avail himself of its provisions on the trial unless pleaded. (*People v. Van Santvoord*, 9 *Cow. R.*, 655; *Commonwealth v. Hutchinson*, 2 *Parsons R.*, 453; *Whart. Am. Cr. L.*, 4th ed., § 445.)

IV. Although the offense was committed prior to the passage of the act of 1860, the indictment, being found subsequent to its enactment, is barred by the statute. In a civil case, the legislature can abridge the time within which an action must be brought, if it be not so shortened that practically no time is left the creditor within which to prosecute his claim. Here he must be left a reasonable time, because he has a vested right to his demand, which the law makers cannot entirely destroy. In criminal cases, *individuals*, as such, have no rights to prosecute, and whether or not the offender shall be punished, is simply a question for the government. At common law, the legislature, by special acts, could pardon offenders even after conviction, and they still have power to say what offenses shall be the subject of prosecution. If they can enact that an offender, after conviction, shall be pardoned, why can they not provide that, unless the prosecution is commenced within a certain time, the offender shall, in effect, be pardoned? The statute of limitations is justly called a statute of repose. It is designed to prevent prosecutions after the witnesses to a

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transaction may have died or forgotten the facts. The government being the only party in interest, can bar itself whenever and as it chooses. (*Morse v. Gould*, 11 N. Y. R., 288; *Smith's Statutory Const.*, §§ 166, 167, 168, 169; *Bay v. Gage*, 36 Barb. R., 447; *Commonwealth v. Hutchins*, 2 Parsons R., 453; *Whart. Am. Cr. Law*, 4th ed., § 446.)

In the *People v. Hartung* (22 N. Y. R., 96), it was held that "the repeal of a law imposing a penalty, although it takes place *after conviction*, arrests the judgment; and where the repeal is *after judgment*, the judgment is to be reversed upon writ of error."

Cook, in reply : In this case, the defendant was in California until shortly before the indictment was found. It was found as soon as practicable after his return.

ROSEKRANS, J. An indictment might have been found the first term after the commission of the offense. It was not material, so far as the finding and presentment of the bill was concerned, where the defendant might be. The finding and presentment of this indictment is all the statute requires to save the rights of the people. We are of opinion that the plea is good, and there must be judgment for the defendant.¹

SUPREME COURT. Orange General Term, September, 1862.

Emott, Lott, Brown and Scrugham, Justices.

HOWARD C. CONRADDY, plaintiff in error, v. THE PEOPLE,
defendants in error.

If a felony has actually been committed, an officer, in arresting the offender, or preventing his escape, will be justified in taking his life, provided there is an absolute necessity for his doing so; it is otherwise in case of an arrest for a misdemeanor.

¹ As to the methods by which the defendant can avail himself of the statute of limitations, see *Whart. American Crim. Law* (4th ed., §§ 436-449, 545).

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Where no process has been issued, a homicide can only be justified, even by an officer, by showing the actual commission of a felony, and that there was a positive necessity to take life in order to arrest or detain the felon.

It is not a defense to an officer, in such a case, to show that he had reasonable ground to believe that the deceased had been guilty of felony, and that he had also reasonable ground to believe that the deceased would otherwise accomplish an escape.

An exception to an expression by the court of an opinion on a question of fact, in a charge to the jury, is not available.

THE prisoner was indicted for the murder of Paul O'Neil, and pleaded not guilty. The issue came on for trial at the Kings Oyer and Terminer, in April, 1862, before Mr. Justice Lott and the Justices of the Sessions.

The prisoner was a police officer, and had arrested the deceased without warrant, and shot at him and killed him, at the time he was escaping from his custody.

After the testimony had closed, and the jury had been addressed by the counsel for the respective parties, the presiding justice charged the jury as follows:

"I charge that the evidence in the case fairly, in the opinion of the court, warrants the conclusion — but of this the jury are to judge — that, on the morning of the 18th of March last, the deceased, Paul O'Neil, committed an assault and battery on his wife, constituting a misdemeanor, but that the act did not amount to a felony; that the prisoner, being at the time a police officer, arrested the deceased therefor without a warrant authorizing such arrest; that the prisoner was taking him to the station house for detention; that the deceased, being under such arrest, and while on the way to the station house, escaped from the officer (the prisoner), and that the officer pursued him, and in such pursuit, and when deceased had reached a considerable distance from the officer, he was shot by a pistol-shot from a pistol of the prisoner in his hands and shot off by him; that the force of the shot was mostly spent at the time, and that such shot caused the death of O'Neil. Assuming such conclusion to be undisputed, the question arises whether the prisoner was justified by the law in the commission of that act."

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The counsel of the prisoner asked the court to charge that, "If the prisoner had reasonable ground to believe, and did believe, that the deceased had been guilty of a felony, and having arrested him therefor, if the prisoner attempted to escape from custody, and there was reasonable ground to believe that the deceased would otherwise accomplish such escape, the prisoner was justified in discharging his pistol at him to prevent such escape."

The court declined so to charge, but charged the reverse: that, assuming the propositions of fact aforesaid to be true, that the prisoner was not justified in discharging his pistol at him to prevent his escape, if such discharge resulted in the death of deceased.

The counsel for the prisoner excepted to the refusal and to the charge, and also to the expression by the court of the opinion expressed by the court in said charge.

Whereupon the jury rendered a verdict of guilty of manslaughter in the fourth degree, and the prisoner was sentenced to imprisonment for one year in the penitentiary of Kings county.

A writ of error was sued out in behalf of the prisoner, and the record removed into this court.

G. T. Jenks, for the plaintiff in error.

I. The exception to the charge was well taken.

The judge's opinion, expressed in the charge, had all the weight and directness of a direction to the jury to find.

The parenthetical clause, "but of this the jury are to judge," does not save the charge from this objection. It was a mere straw in the way of the positive statement of facts immediately following.

There can be no doubt that the jury, under the charge, were deprived of the only duty which they had to perform, which was to answer the question, was the act of Paul O'Neil, for which he was arrested, a felony?

Again, the jury were not to judge whether, in the opinion of the court, the evidence fairly warranted the conclusion, but

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they were to determine, among other things, whether any other conclusion was not warranted by the evidence in favor of the prisoner's innocence.

II. The exception to the refusal to charge was well taken. If the acts of the officer are necessary to apprehend a person charged with felony, he is justified, even if the acts cause the death of such person.

If the officer might lawfully take life while endeavoring to apprehend such person, it is difficult to perceive why the officer is not equally protected in his acts done to retain the custody of such person.

The act of fleeing is as much a resistance to the efforts of the officer as is a physical contest with him.

The life is taken by an act designed to take or retain a prisoner, and it is not necessary that the officer should be a combatant, defending his own life or resisting an attack upon himself. (*Barb. Crim. Law*, 88, and cases cited; 4 *Black. Com.*, p. 179, and cases cited in foot note; 3 *Greenl. Ev.*, § 115.)

John Winslow (District Attorney), for the defendants in error.

I. It was not improper nor illegal for the court to express the hypothetical opinion excepted to.

The due and proper administration of justice may require a distinct intimation from the court. This is especially true where juries manifest a disposition to evade the law or usurp the province of the court.

In the case at bar, the facts were left to the jury, with the statement from the court that, if certain facts had been proved, then certain legal results must follow.

It has been distinctly adjudicated that such instructions are lawful and proper. (*The People v. Thayer*, 1 *Park. Crim. R.*, 596, per WALWORTH, J.)

In the case of *Gardiner v. Pickett* (19 *Wend. R.*, 186), the court expressed an opinion to the jury as to whether a certain material fact had been proven. It was there held that merely expressing an opinion was not irregular.

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II. The court properly declined to charge that, "if the prisoner had reasonable ground to believe, and did believe, that the deceased had been guilty of a felony, and having arrested him therefor, if the prisoner attempted to escape from custody, and there was reasonable ground to believe that the deceased would otherwise accomplish such escape, the prisoner was justified in discharging his pistol at him to prevent such escape."

The court correctly charged, "that, assuming the propositions of fact aforesaid to be true, the prisoner was not justified in discharging his pistol at him to prevent his escape, *if such discharge resulted in the death of deceased.*"

The deceased, prior to the arrest, committed, if any offense at all, an assault and battery on his wife—a simple misdemeanor.

It is well settled that an officer, having lawful custody of his prisoner, who has committed a misdemeanor only, cannot kill him to prevent an escape, not even if it is certain that the prisoner will escape unless killed.

But where the prisoner has committed a felony, his life may be taken to prevent an escape. But even in a case of felony, it will be manslaughter to kill the prisoner unless it is absolutely necessary, and every other means at hand is insufficient.

Blackstone says, "it is murder to shoot or otherwise unlawfully kill a person committing a misdemeanor, although he could not otherwise have been taken." (4 *Black. Com.*, 201; 1 *Wheeler's Cr. Cases*, 269.)

"But under circumstances," it is said (1 *Hale P. C.*, 481, cited in 2 *Bishop's Cr. L.*, § 578), "it may amount only to manslaughter if it appear that death was not intended."

But in cases of felony, if the felon fly from justice he may be killed. (*Bishop, supra*, § 577.)

Where a constable endeavored to arrest a man committing a misdemeanor, but the man refused to stop on demand, and so the constable fired a pistol and hit him in the leg, the constable was convicted of felony.

In this case the man was actually guilty of felony, it being

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the second offense, petit larceny, but inasmuch as the fact was not known to the constable, the conviction was held proper. (1 *Eng. L. & Eq. R.*, 566.)

In *Wharton's American Law of Homicide*, p. 49, the rule is thus stated: "A distinction exists between misdemeanor and felony. In the former it is not lawful to kill the party accused, if he fly from the arrest, though he cannot otherwise be taken, and though there be a warrant to apprehend him; but under circumstances it may amount to manslaughter if it appear that death was not intended," and 1 *East P. C.*, 302, is cited.

"But where a felony has been committed, the felon may be killed to prevent the escape. But if he may be taken in any case without such severity, it is at least manslaughter in him who kills him; and the jury ought to inquire whether it were done of necessity or not." (*Wharton's L. of Am. Hom.*, 50, 51; 1 *Hale R.*, 481, 489, 494.)

It will be seen from the authorities that the rule is clear and definite; that in no case where a simple misdemeanor only has been committed, must an officer take life to prevent escape. The rule is unqualified. It matters not what may have been the belief of the officer or the grounds of his belief. If he takes life, he does it at his peril. If it turns out that the party killed was guilty of misdemeanor only, the officer must answer.

The law is tenderly regardful of the sacredness of human life, and even in cases of felony will not permit it to be sacrificed except in cases of imperious necessity.

III. In the case at bar, the officer made the arrest without a warrant. The misdemeanor was not committed by the deceased in the view of the officer.

By section thirty of police act (*chap. 258, Sess. L. of 1860*), a policeman may arrest without warrant only where the offense is committed within his view. The officer was, therefore, a trespasser *ab initio*.

By the Court, EMOTT, J. The argument for the prisoner proceeds upon the assumption that the only question for the

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jury at the trial was, whether a felony had actually been committed by O'Neil, whose life the prisoner took. This is an error. The rule of the common law undoubtedly is, that if a felony has been committed, an officer will be justified even if he take the life of the offender, in arresting him or preventing his escape, provided there is an absolute necessity for his doing so, while it is not so in the case of an arrest for a misdemeanor. (3 *Inst.*, 224; *Foster Cr. L.*, 271; 1 *Hawk. P. C.*, 6, 1, ch. 28, § 11; 4 *Bl. Com.*, 180; 1 *East Cr. L.*, ch. 5, § 66, p. 298.) The Revised Statutes preserve the same rule. (2 *R. S.*, 660, §§ 2, 3.) When no process has been issued, a homicide can only be justified, even by an officer, by showing the actual commission of a felony, and that there was a positive necessity to take life in order to arrest or detain the felon. When, therefore, a homicide is committed by an officer who is acting without a warrant, it is a material question whether the person killed had committed a felony, but it is equally material to determine whether it was in fact necessary for the officer to take his life in order to effect his arrest or prevent his escape. At the trial the prisoner's counsel requested the court to instruct the jury that if the prisoner believed, upon reasonable grounds, that the deceased had been guilty of a felony, and also upon like reasonable grounds that he would otherwise escape from custody, the killing was justifiable. So I understand the proposition of the counsel at the trial and his argument before us. Such is not the rule of law. There is but one case in which the law justifies the taking of life upon the belief or apprehension of the person accused himself, and that is the case of self-defense. A man may act in his own defense upon what he had reasonable ground to consider was imminent danger or urgent necessity, and he will be justified, although his apprehensions were in reality mistaken. But in taking life to prevent the commission of crime upon another, or to prevent the escape or effect the arrest of a person accused of crime, there must be the actual necessity of such homicide, and not merely reasonable grounds to suppose that it was necessary; and this must be shown to the jury.

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The propositions submitted to the court on the trial seem to me to be open to the objection, in every instance, that they called upon the jury to determine whether the homicide was justifiable, by deciding whether or not the prisoner had reasonable ground to suppose, as things appeared to him, that the deceased would escape if he did not shoot him. This, as I have said, would not have been enough. The prisoner was bound to show the fact, and not merely the appearance to him, of a necessity for what he did. The jury are to judge of the actual necessity for his act, and not of the appearance to him.

If the learned judge at the trial went far enough in his charge to raise the question, which was argued at the bar, as to when an officer would be justified in taking the life of a person whom he had in custody, and who would otherwise escape, yet we are of opinion that no error was committed of which the prisoner can complain. The judge instructed the jury that, assuming that the prisoner had reasonable ground to believe that the deceased had been guilty of felony, and had arrested him therefor, and that the prisoner attempted to escape, and there was reasonable ground to believe that he would otherwise escape, the prisoner was not justified in discharging his pistol at the deceased, if that discharge produced his death. This was equivalent to stating that the prisoner was not justified in taking the life of the deceased to prevent his escape, upon the state of facts which has been given.

The prisoner, although an officer, was acting without a warrant. No warrant had been issued by or to any one against the deceased. Nor had he committed any offense in the view or presence of the officer. Under such circumstances, to justify taking life, even if the jury were satisfied of the necessity of the homicide to prevent an escape, it must be shown that a felony had actually been committed. The distinction is marked between cases of misdemeanor and of felony. It is only in the latter that a homicide is justifiable by any person acting without a warrant, even when it is the only means to prevent the escape of the criminal. When no warrant is out for the offender, even an officer cannot take his life to prevent his

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escape upon his own belief of the commission of a felony, however reasonable ground he may have for such a belief. If he act without a warrant, he must be prepared to show the fact of the felony, in order to justify taking the life of a person whom he is endeavoring to arrest or to secure. The counsel for the prisoner excepted to the statement by the presiding judge to the jury that, in his opinion, the evidence fairly warranted the conclusion that the deceased had been guilty of a misdemeanor, and not of a felony. The judge added, that the jury were to judge of the correctness of the conclusion. It was perfectly proper for the judge to state his view of the facts in proceeding to lay down the law to the jury; and the qualification that the jury might judge of the correctness of his statement was probably unnecessary. It has been repeatedly held that no exception can be taken to the expression of an opinion by the court upon a question of fact. I have already said that the learned counsel for the prisoner is in error in supposing that this particular question is the only, or the most material, question of facts in the case.

It might, however, be sufficient to dispose of this exception to say, that we find no evidence upon which the jury could properly have come to the conclusion that O'Neil, the deceased, had been guilty, or could reasonably have been supposed to have been guilty, of anything more than a misdemeanor.

There was no evidence of the commission of a felony; and the judge stated the facts in the only way in which the jury could have been authorized to find them.

There was no error committed upon this trial of which the prisoner can complain; and his conviction must be affirmed.

SUPREME COURT. Jefferson General Term, October, 1862.

Mullin, Morgan and Bacon, Justices.

THE PEOPLE *v.* JOHN DURKIN.

A prisoner may be convicted of arson in the second degree, as described in 1 R. S., 667, § 2, under a count charging that offense, if sustained by the evidence, although the facts proved would authorize his conviction for arson in the first degree under an indictment properly charging the higher offense.

The words, "not being the subject of arson in the first degree," used in the statute defining arson in the second degree (2 R. S., 666, § 2), were intended to distinguish between different degrees of the same general offense, with a view to graduate the punishment, and do not create an exception which the pleader is required to negative in charging the offense of arson in the second degree.

THE defendant was tried at the Onondaga county Oyer and Terminer, in June, 1862 — Justice MULLIN presiding. The indictment contained seven counts: the first two for arson in the first degree; the third, fourth and fifth for arson in the second degree; and the sixth and seventh for arson in the third degree. On the trial, the second, fifth, sixth and seventh counts were disposed of by the court, or abandoned by the district attorney. The first count charged the defendant with setting fire to his own house in the night time, "there, then and there being within said dwelling house some human being, to wit, Ann Welch." The fourth count charged the defendant with setting fire in the night time to his own house, "which said building was then and there adjoining to a certain inhabited dwelling house there situate of one Austin Wagner, he the said Austin Wagner then and there being within the said dwelling house of him the said Austin Wagner, and the said dwelling house of him the said Austin Wagner then and there being endangered by such firing." The third count was the same in substance, except it charged that the fire endangered the inhabited dwelling house of one Patrick Lynch. On the trial, evidence was given tending to prove that Ann Welch, mentioned in the first count, was an accomplice of the defendant. The court charged the jury that, if Ann Welch was an

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accomplice, there could be no conviction under the first count of the indictment. Ann Welch gave evidence tending to show that one John Smith lodged at the house of the defendant when it was fired. The counsel for the defendant asked the court to charge that, if Ann Welch was an accomplice, and Smith was not an accomplice, there could be no conviction under the indictment. This the court refused to charge, and the defendant's counsel excepted. The defendant's counsel then requested the court to charge that the defendant could not be convicted under the third and fourth counts of the indictment, for the reason that the building was a dwelling house, and was the subject of arson in the first degree. The court declined so to charge, and the defendant's counsel excepted. The jury, by their verdict, found the defendant guilty of arson in the second degree. The prisoner's counsel tendered a bill of exceptions, and the judgment was stayed until the same could be heard at general term upon *certiorari*.

D. Pratt, for the prisoner.

I. The court erred in refusing to charge the jury that, if Ann Welch was an accomplice and Smith was not an accomplice, there could be no conviction under the third and fourth counts:

1. The court had charged that the prisoner might be convicted of the first degree, although the house was occupied at the time by the prisoner himself. This had been so held in the Court of Appeals. (*People v. Shepherd*, 19 *N. Y. R.*, 537.)

2. It would follow that, if Durkin set fire to the house while Smith, who was not an accomplice, was lodging therein, it was a case of arson in the first degree.

a. To constitute arson in the second degree, under these counts, the building must be a shop, warehouse or other building *not the subject of arson* in the first degree. (2 *R. S.*, 666, § 2.)

b. If Smith lodged in the house at the time, and was not an

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accomplice, it was clearly the subject of arson in the first degree.

c. The general rule is, that the higher crime merges crimes of inferior grade, especially where the higher crime is capital. (1 *Russ.*, 50.)

d. It is the case of a conviction of an inferior grade where he might be convicted of the superior. There was no count to which the evidence could apply.

II. The court erred in refusing to charge generally that the prisoner could not be convicted under the third and fourth counts of the indictment:.

1. The building, without regard to the persons lodging therein, was the subject of arson in the first degree.

Frank Hiscock (District Attorney), for the People.

There was no error in the charge. I apprehend it is to be contended by the prisoner's counsel that the proposition embodied in the exceptions is, that if *some* Smith was in the building at the time of the firing, and was not an accomplice of Durkin, then the prisoner could not be convicted of arson in the second degree, on account of the exception in the statute defining that degree of arson—"not being the subject of arson in the first degree;" but no such question is raised by the exception.

a. The exception does not even assume a Smith was in the building, and it was not an assumed fact upon the trial.

b. But the assumption of such a fact by the exceptions would not be sufficient. It was a question of fact, to be submitted to the jury.

But granting that the question, as insisted on by the counsel for the prisoner, was fairly before the court, then we say it was properly disposed of by the court.

a. We concede the doctrine that usually in criminal statutes an exception in the enacting clause must be negatived. That is doubtless the case when a single section of the statute, independently by itself, defines a crime complete in all its degrees.

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b. But when there is a series of sections of a statute defining an offense, each section defining a degree of the same offense, or where there is a gradation of offenses of the same species as in arson, it is not necessary to negative the exceptions or allege that the case is not embraced in some other section than the one in question. It is sufficient if the evidence may be applied to the section by virtue of which the punishment is to be awarded.

It is a well established rule, that where there are several species of the same general crime, with more or fewer circumstances of aggravation, as larceny, grand and petit, and felony aggravated by being a second offense, burglary, murder, manslaughter and many others, and subject to a gradation of punishments, it is not necessary to negative those circumstances which would render it more aggravated. (*Commonwealth v. Griffin*, 21 Pick. R., 523; *Same v. Squire*, 1 Metc. R., 258; *Same v. Devoe*, 3 Id., 316; *Same v. Larnard*, 12 Id., 250.)

The objection that the building fired was a dwelling house, and therefore the subject of arson in the first degree, is not tenable. A dwelling house is no more the subject of arson in the first degree than in the third and fourth degrees. (§§ 4 and 6, p. 946, 3 vol., 5 ed., R. S.) The bare fact that it was a *dwelling house* does not bring it within the exception of the statute defining arson in the second degree. (See § 9, p. 986 of *same volume*.) And this is made more manifest by the reading of 4th section (p. 946, vol. last cited), which provides against burning, in the night time, the *house of another*, not the subject of arson in the first or second degree; showing clearly that the legislature intended that a house (see § 2, *same page*) might be the subject of arson in the second degree, if fired under the proper circumstances of aggravation.

By the Court, MORGAN, J. The defendant was convicted of arson in the second degree, for firing a building adjoining a certain inhabited dwelling house, situate in the city of Syracuse, belonging to one Austin Wagner. The same indictment charged the defendant with firing his own house in the night

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time, it being a dwelling house, and "there, then and there being within the said dwelling house some human being, to wit, one Ann Welch."

The evidence tended to show that Ann Welch was an accomplice. The court charged the jury that if Ann Welch was an accomplice, then the prisoner could not be convicted under that count.

Ann Welch swore that one John Smith was in the defendant's house the night of the fire, and slept with the defendant.

The defendant's counsel thereupon raised the point that if Ann Welch was an accomplice, and Smith was not, there could be no conviction under the indictment. The court overruled the point, and the prisoner's counsel excepted.

And this is the only point of any serious difficulty in the case.

The indictment did not charge that John Smith was in the house at the time of the fire. If there had been such a charge, perhaps the jury would have found the defendant guilty of arson in the first degree, for the jury might have believed Ann Welch as to Smith's lodging there at the time of the fire. Evidently the jury must have believed that Ann Welch was an accomplice, or they would have found the defendant guilty of arson in the first degree.

Does it lie in the mouth of the defendant to say that he was guilty of a higher crime than the one for which he was convicted, when the difference is only in degree? The language of this objection is, that the defendant was guilty of arson in the first degree, and therefore was not guilty in the second degree.

The statute (2 R. S., 657, § 9), defines arson in the first degree to consist "in willfully setting fire to or burning in the night time a dwelling house, in which there shall be at the time some human being; and any house, prison, jail or other edifice, which shall have been usually occupied by persons lodging therein at night, shall be deemed a dwelling house of any person so lodging therein."

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The offense of arson in the second degree, for which the defendant was convicted, is defined as follows: "Every person who shall willfully set fire to or burn in the night time any shop, warehouse or other building, *not being the subject of arson in the first degree*, but adjoining to or within the curtilage of any inhabited dwelling house, so that such house shall be endangered by such firing, shall, upon conviction, be adjudged guilty of arson in the second degree." (2 R. S., 666, § 2.)

It is argued that if the defendant's house was occupied by John Smith as a lodger at the time the defendant fired it, it was the subject of arson in the first degree, and therefore the firing of it, although it endangered Wagner's house, which adjoined it, could not be arson in the second degree. This argument, if sound, would require the district attorney to specify in his indictment that the building set fire to was not the subject of arson in the first degree. The construction contended for makes it a part of the ingredient of the offense of arson in the second degree, that the house should not be so circumstanced as to be the subject of arson in the first degree. It is admitted that the language of the statute seems to favor such a construction, although in practice it has never been thought necessary to incorporate the negative into the indictment by way of exception.

The usual rule is well settled that where the accusation includes an offense of an inferior degree, the jury may convict of the less offense. Thus upon an indictment for burglariously stealing, the prisoner may be convicted of a simple larceny; upon an indictment for stealing privately from a person, the prisoner may be convicted of simple larceny (1 *Chitty Cr. L.*, 638); and by our Revised Statutes the jury may find the prisoner guilty of an offense in an inferior degree when the offense consists of different degrees. (2 R. S., 702, § 2.) In *The People v. Jackson* (3 *Hill R.*, 99), the indictment charged the defendant with producing an abortion of a quick child, which is punishable as a felony. The jury were allowed to convict the defendant of a misdemeanor only, the proof being that the child was not quick.

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And where there are several species of the same general crime, with more or fewer circumstances of aggravation, subject to a gradation of punishment, the defendant may be convicted of either species, under an indictment which charges the higher offense.

It may be said, however, that the offense of arson in the first degree does not include arson in the second degree, but that it is a different offense. True, it does not necessarily include the inferior offense; but when it does so in fact, where is the difficulty of bringing it within the general rule? If there is no inhabited dwelling house adjoining the one set fire to, there could be no arson in the second degree. But it happens here there was such a building; so the defendant was not only guilty of firing his own house, but of endangering that of his neighbor adjoining it. This last was a lesser offense, but it was included in the greater offense in this particular case; and the indictment was drawn with a separate count, charging it as a distinct offense, so as to meet the facts of the case.

It was not supposed, on the argument, that the objection would be available, if it had been left to the jury to decide, as a matter of fact, whether Smith was a lodger or not in the defendant's house. If no one lodged there, the building would not be the subject of arson in the first degree, and the firing of it would be arson in the second degree—made so by the fact that it adjoined the inhabited dwelling house of Austin Wagner.

The main difficulty, therefore, arises out of the statutory definition of arson in the first and second degrees; for it is apparent that the prisoner was guilty of arson in the first degree, upon the hypothesis that his own building contained Smith as a lodger. The jury were, however, told by the judge that, notwithstanding this, they could legally convict him of arson in the second degree. The exception is to the legal proposition, and not to the propriety of advising the jury that they ought not to convict the defendant of the second offense if they believed him guilty of the principal offense.

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The question, then, comes back to the point whether the defendant may be indicted and convicted of arson in the second degree, when the facts proved on the trial would justify a conviction for the principal offense, provided the indictment had properly charged it. No doubt a person may be indicted and convicted of larceny, although the facts prove a burglary. Evidence of an assault with a weapon dangerous to life, will support a complaint for a simple assault, even if the complaint alleges that it was not committed with a weapon dangerous to life. (14 *Gray R.*, 100.) And in *Commonwealth v. Pike* (8 *Cush. R.*, 181), the defendant was held to have no just ground of objection to a conviction upon an indictment for manslaughter, because the facts proved that he had been guilty of murder. The propriety of taking such a conviction is another matter. So here there is no difficulty in coming to the conclusion that the defendant was guilty of setting fire to his own building in the night time, which adjoined the inhabited dwelling house of Austin Wagner, and that the fire endangered Wagner's house. But it is said his own house was "the subject of arson in the first degree," whereas the statute speaks of firing a building "not the subject of arson in the first degree." I have already suggested that if these words are a part of the description of arson in the second degree, they should be negatived in the indictment. The plain import of such words, if they constitute one of the ingredients of the offense, creates an exception limiting the application of the statute as much as if it should read thus: "Provided no one shall be liable to indictment and conviction for arson in the second degree, if the building set fire to shall be an inhabited dwelling house, in which there shall be at the time some human being."

I think it was not the object of the statute to create such an exception, but simply to define the different degrees of the same crime with a view to graduate the punishment. The words, "Not being the subject of arson in the first degree," were only intended to distinguish between the different degrees of the same general offense. They prove the general identity of

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of the crime by a provision which declares, in effect, that the defendant shall not be the subject of punishment under both sections of the statute. And it follows that a conviction under one section of the statute would bar a conviction under the other.

The court, in *Commonwealth v. Squires* (1 Metc. R., 258), gave the same construction to a statute somewhat similar to our own. By the Revised Statutes of Massachusetts (ch. 126, § 5), it was enacted that "any person who shall maliciously burn, either in the night or day time, any banking house, store, manufactory, mill, barn, stable, ship, office, outhouse, or other building whatever of another, *other than is mentioned in the third section,*" shall be punished by imprisonment in the State prison not more than ten years. Section third enacted that "any person who shall willfully and maliciously burn, in the night time, any meeting house, church, court house, town house, college, academy, jail or other building, erected for public use, or any banking house, warehouse, steam manufactory or mill of another (being with the property therein contained of the value of \$1,000), or any barn, stable, shop or office of another, within the curtilage of any dwelling house or any other building, by the burning whereof any building mentioned in this section shall be burned in the night time, shall be punished by imprisonment in the State prison for life."

The indictment under the fifth section did not set forth that the building was "other than is mentioned in the third section." The court says (p. 268): "This is not like the ordinary case of a statute declaring certain acts to be a crime under certain qualifications contained in a proviso or exception. Upon comparing the third and fifth sections of the statute, it is obvious that the exception here is rather to be considered in the light of a gradation of punishments to different degrees of the same species of offense; the third section providing, as it does, that all cases of willful and malicious burning therein described, shall be punished by imprisonment in the State prison for life, and the fifth section, after specifying certain cases, then providing generally for the punishment for burn-

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ing all other buildings not mentioned in the third section. It is only another example of the same kind of gradation of punishments that is provided in cases of larceny of the various grades."

The same construction was given to another similar statute in Massachusetts, in *Devoe v. The Commonwealth* (8 Metc. R., 316; *Statutes of 1804, ch. 143, § 4*). The indictment charged the defendant with breaking and entering, in the night time, a certain office, and stealing therein, without adding the words, "not adjoining to or occupied with a dwelling house," as contained in section four defining the offense.

The court say: "It is conceded, as a general rule, that two distinct offenses cannot be charged in the same indictment; but this rule is subject to exceptions, one of which is, where the same combination of facts will bring a case within different penal provisions." (p. 823.) I will cite another passage from the opinion of Chief Justice SHAW, at page 827: "If it is intended to charge the mitigated offense, it is sufficient to charge those facts which constitute the crime, simply omitting the circumstances which, by the statute, would aggravate the offense and increase the punishment. In such cases, the words in the statute, "without being armed," &c., are not so much designed to constitute a description of the offense as to show that it is intended to distinguish it from a higher grade of offenses, within which it would fall if those circumstances existed." (*And see Larned v. The Commonwealth, 12 Metc. R., 240.*)

According to the authority of these cases, it is not necessary to set forth the facts, although they exist, which constitute the higher offense, where there is a gradation of offenses of the same species, unless the prosecutor designs to convict for the higher offense; and it does not lie with the defendant to object that the facts proved brings his case within a higher grade of offense of the same species; for a former conviction or acquittal of a minor offense, is a bar to a prosecution for the same act charged as a higher crime, whenever the defendant, on trial of the latter, might be legally convicted of the former,

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had there been no other prosecution. (2 *Leading Cr. Cas.*, by *Burnett & Heard*, 558.) In *Johnson v. The People* (1 *N. Y. R.*, 379), the indictment charged all the facts necessary to constitute the crime of manslaughter, except the intent with which the acts were done, and in its conclusion, it characterized the crime as manslaughter; but the only intent charged was an intent to produce a miscarriage; and held that the indictment was fatally defective for the felony, but good for the misdemeanor. And it was conceded that a conviction for a misdemeanor, under such an indictment, would be a bar to a subsequent indictment for the felony.

In my opinion the defendant in this case could have been indicted and convicted, upon the evidence, of arson in the second degree, if there had been no other count in the indictment. It would be no defense to the charge, that the facts proved authorized his indictment and conviction for arson in the first degree. The objection of the defendant simply disputes this proposition, for it can make no difference that there was also a count charging him with the higher offense. That count was not proved. The defendant now says, the district attorney ought to have indicted him for the higher offense, and charged that John Smith was in his own house when it was set on fire. If we allow the objection, it may turn out on a second indictment, that his accomplice, Ann Welch, would locate some other Smith in the same house instead of John Smith, or, what is more probable, it might appear that there was no one but his accomplices in the house when it was burned. And thus the defendant might obtain impunity by changing his ground upon each successive charge, while in fact he was guilty of arson both in the first and second degrees. I think the conviction is right and should be sustained.

Conviction affirmed and proceedings remitted to the Onondaga Oyer and Terminer.

SUPREME COURT. Monroe General Term, March, 1862. *Johnson, Welles and Campbell*, Justices.

THE PEOPLE v. EDWARD KENYON.

Form of an indictment for seduction under a promise of marriage.

Charge of the court to a jury on a trial for seduction, containing a statement of the different questions of fact to be decided, and of the rules of law by which they were to be governed.

The words, "previous chaste character," as used in the "act to punish seduction as a crime," mean "actual personal virtue."

On the trial of an indictment under that statute, it is not competent for the defendant to prove what was the previous reputation of the prosecutrix for chastity; but the question is, was she, in fact, a woman of chastity before the alleged offense. It is only by proving specific acts that her previous character can be assailed.

Nor is it competent on the trial of such an indictment, to prove by general reputation that the house of the mother of the prosecutrix, where the prosecutrix lived, was a house of ill-fame. If such a fact is proper to be proved, it should be established, not by hearsay, but by positive testimony.

To convict under this statute, which subjects to punishment "any man who shall, under promise of marriage, seduce," &c., it is not necessary to prove on the trial that the defendant is twenty-one years of age. If he is old enough to be the father of the child begotten by him, he is sufficiently within the description of the statute to be amenable to punishment for the offense.

The statute, in providing that no conviction shall be had on the testimony of the female seduced, unsupported by other evidence, does not require the testimony of an additional witness. The corroborating evidence may be supplied by the facts and circumstances surrounding the transaction and otherwise established in the case.

Where the prosecutrix testified that she was unmarried, and it appeared that she was sixteen years of age at the time of the alleged offense, and living with her mother, the fact that she was unmarried was held to be, *prima facie*, sufficiently established within the requirement of the statute.

Where a seduction is accomplished by means of a promise of marriage on the part of the seducer, a consent of the female to marry the seducer, amounting to a mutual promise on her part to marry, is implied.

Where it was proved on the trial that the defendant was a frequent visitor at the house of the mother of the female seduced, that he waited on her to balls and parties, and took her out frequently to ride, and when her mother spoke to him about his keeping company with her daughter, said his motives were good, it was held that such facts were proper evidence for the consideration of the jury, in corroboration of her testimony, to prove that he had made to her a promise of marriage.

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The testimony of the female, as to the illicit connection with the defendant, is corroborated by evidence that she was delivered of a child, of the abundant opportunity afforded for the defendant to become the father of it, and of the external evidences of the intimacy existing between the parties.

The statute does not require that the testimony of the female shall be corroborated in every particular. It is only necessary that it should be supported in the main features of the case.

THE defendant was indicted for seduction under a promise of marriage. The following is a copy of the indictment:

State of New York, Yates county, ss.:

The jurors of the People of the State of New York, and for the body of the county of Yates aforesaid, upon their oath do present that Edward Kenyon, late of the town of Jerusalem, in the county of Yates aforesaid, heretofore, to wit, on the second day of May, in the year of our Lord one thousand eight hundred and sixty, at the town of Jerusalem, in the county of Yates aforesaid, unlawfully, willfully and feloniously, under and by means of promise of marriage, did seduce and have illicit sexual intercourse and connection with one Mary Chissom, he, the said Edgar Kenyon, being then and there a man, and the said Mary Chissom then and there being an unmarried female of previous chaste character, contrary to the form of the statute in such case made and provided, and against the peace of the People of the State of New York, their laws and dignity.

And the jurors aforesaid, upon their oath aforesaid, do further present, that heretofore, to wit, on the twentieth day of March, in the year of our Lord one thousand eight hundred and sixty, at the town of Jerusalem, in the county of Yates aforesaid, the said Edgar Kenyon undertook and promised to and with one Mary Chissom, who was then and there an unmarried female of marriageable age and condition, to marry her, the said Mary Chissom, whenever he, the said Edgar Kenyon, should be thereunto afterwards requested, and mutual promises of marriage were then and there made by and between the said Edgar Kenyon and the said Mary Chissom.

And the jurors aforesaid, upon their oath aforesaid, do further say, that after the making of the said promise of marriage

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by the said Edgar Kenyon, to wit, on the second day of May, in the year of our Lord one thousand eight hundred and sixty, at the town and in the county aforesaid, he, the said Edgar Kenyon, did, under and by means of his said promise of marriage, willfully and feloniously seduce and have illicit connection with the said Mary Chissom, he, the said Edgar Kenyon, at the time aforesaid of the making of the promise of marriage aforesaid, and also at the time last aforesaid of the seduction and illicit connection aforesaid, at the town and in the county aforesaid, being a man, and she, the said Mary Chissom, at the time aforesaid of the making the promise of marriage aforesaid, and also at the time aforesaid of the seduction and illicit connection aforesaid, at the town and in the county aforesaid; being an unmarried female of previous chaste character, contrary to the form of the statute in such case made and provided, and against the peace of the People of the State of New York, their laws and dignity.

And the jurors aforesaid, upon their oaths aforesaid, do further present that heretofore, to wit, on the twentieth day of March, in the year of our Lord one thousand eight hundred and sixty, at the town of Jerusalem, in the said county of Yates, the said Edgar Kenyon undertook to and promised to and with one Mary Chissom, who was then and there an unmarried female of marriageable age and condition, to marry her, the said Mary Chissom, and mutual promises of marriage were then and there made and entered into by and between the said Edgar and Mary.

And the jurors aforesaid, upon their oath, do further say: That after the making the said promise of marriage by the said Edgar Kenyon, he, the said Edgar Kenyon, under and by means of his said promise of marriage, willfully and feloniously did seduce and have illicit connection with the said Mary Chissom, she being then and there an unmarried female of previous chaste character, contrary to the form of the statute in such case made and provided, and against the peace of the People of the State of New York, their laws and dignity.

H. M. STEWART, *District Attorney.*

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The prisoner, by his counsel, moved to quash the indictment on the following grounds, among others, appearing therein :

I. (1.) That the first count is bad, because it does not allege that the prisoner was unmarried or otherwise capable of entering into the marriage contract at the time of making the promise of marriage and of having the illicit intercourse, or that Mary Chissom was. (2.) The first count is also bad, because the promise of marriage is not alleged to be mutual.

II. The second count of the indictment is bad, because it does not show or allege that the prisoner was unmarried or otherwise capable of entering into the contract of marriage at the time of making the promise and having the illicit connection, or that Mary Chissom was.

III. That the third count is bad, because it does not allege the prisoner is a man, or that he was legally capable of making or entering into a contract of marriage.

This motion was overruled by the court, to which decision the prisoner's counsel excepted.

The trial of the indictment took place before WILLIAM S. BRIGGS, county judge, and the Justices of the Sessions, at a Court of Sessions for Yates county, held in November, 1861.

The district attorney, on the part of the people, called as a witness the prosecutrix,

Mary Chissom, who, being duly sworn, testified as follows : My name is Mary Chissom ; I know the defendant ; I first became acquainted with him three years ago last spring ; I resided at Kinney's Corners ; he resided on Bluff Point, four miles from my residence ; he visited me and paid attentions to me as a suitor after he became acquainted with me ; it was in the spring he first came to visit me ; his visits continued about a year steady ; at that time he discontinued them ; he visited me about every two weeks during the first year ; during that time he accompanied me to parties, excursions, &c., quite often.

Q. During that time did you receive visits from any other persons ?

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This question was objected to by defendant's counsel on the grounds, 1st. That it is irrelevant and immaterial; 2d. That it tends to prejudice the defendant before the minds of the jury. The court overruled the objection, and the counsel for the defendant excepted.

A. I did not; during that time Mr. Kenyon did not at any time state what his object was in visiting me; he has visited me since that time; he discontinued his visits at that time for the term of one winter; they were discontinued along in the fall; they were discontinued until July following; he recommenced his visits in the summer, in July; his visits continued then until along in the winter; I don't know exactly what time they were discontinued; there have been visits since that; they commenced in May and continued until November, a year ago this November; he has not visited me since that; he has spoken to me during these visits upon the subject of marriage; he first spoke to me in the summer; a year ago this last summer; I don't recollect the month; it was in the spring, I think, that he first spoke to me upon the subject of marriage; I don't know what month it was.

Q. What did the defendant say to you in regard to marriage?

This question was objected to by the counsel for the defendant, on the grounds, 1st. That time is material; 2d. That the time of making the promise and having the illicit connection, as alleged in the indictment, was the 2d day of May, 1860, and the People must prove the same as alleged in the indictment. The court overruled the objection and admitted the evidence, to which decision the counsel for the defendant excepted.

A. The substance of the conversation was, he said he and I would be married in the fall; he said if I would do so and so, he would marry me; that is the way he spoke; those were the words he used; I don't remember what else he said; when he said this he was by me, by my side; I don't know where his arms were; he said something to me in connection with having sexual intercourse with me; he said if I would do so

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and so, he would marry me; that is what I mean by what he said upon the subject of his having sexual intercourse with me; I told him no, sir; he urged me; he said nobody would know it, and he would have me; there was nothing further said then; he had sexual intercourse with me after this conversation; I consented after he had stated that; he said he would marry me last fall; I didn't say anything about it then; this visit was at home, at my mother's house; it was in the evening; I don't know what month or day of the month it was; it was in the spring; the next time he visited me was the next week, at my mother's house; I don't remember whether there was anything said upon the subject of marriage or not, at that time; these same acts were not committed by him at that time; they were committed after that; after this first time that I mentioned, he visited me once or twice a week during the spring and summer; there was something said upon the subject of marriage after that; it was in June or July, I don't know which; at the time of the first conversation, I don't remember whether there was anything said by me as to my being willing to marry him; he said he would have me.

Q. When did the sexual intercourse take place?

This question was objected to by the counsel for the defendant on the grounds, 1st. That no sufficient grounds have been shown to warrant the inquiry; 2d. That it being alleged in the indictment to have been on the 2d day of May, 1860, it is necessary for the prosecution to prove it as alleged — time being material; 3d. That there has been no legal promise or contract of marriage proven between the parties, and the evidence is irrelevant and immaterial. The court overruled the objection and admitted the evidence, to which decision of the court the counsel for the defendant excepted.

A. This sexual intercourse was after this conversation between us upon the subject of marriage.

Q. What influence did this promise of his to marry you have upon your mind by way of inducing you to consent to have sexual intercourse with him?

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This question was objected to by the counsel for the defendant, on the grounds, 1st. That it is improper; 2d. That it was a question that belonged exclusively to the province of the jury. The court overruled the objection and admitted the evidence, and the counsel for the defendant excepted.

A. I thought he was going to have me, and nobody would know it. That sexual intercourse continued from time to time afterwards. I am the mother of a child. It was born the 30th day of January last.

Q. Who was its father?

This question was objected to by the counsel for defendant, on the grounds, 1st. That it is improper; 2d. That it is only alleged in the indictment that intercourse took place, and whether there was fruit from the act we are not here to litigate; 3d. That it is irrelevant. The court overruled the objection and admitted the evidence, to which decision the counsel for defendant excepted.

A. Edgar Kenyon, the defendant.

Q. State whether or not you have had sexual intercourse with any other person except Edgar Kenyon, the defendant.

This question was objected to as leading and incompetent. The court overruled the objection, to which decision the counsel for the defendant excepted.

A. I never did. I have never been married. I have never received the addresses of any other person as a suitor, except the defendant; no other person has ever visited me as a suitor since this first conversation in the spring upon the subject of marriage. I have resided at my mother's; I had resided at my mother's during two or three years previous; my mother is present; it is this lady; her name is Eliza Chissom; I have no father living. When Edgar Kenyon commenced visiting me first, I was at home; I was sixteen years old then; I am now eighteen. I don't recollect how long he stayed with me the first time; he came in the afternoon about 4, and stayed until dark—till in the evening some time; I was with him alone; I was with him all the time in the front room alone. My mother and sister were about the house at that time. He

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came the next Friday about 3 o'clock in the afternoon; this was in the spring; he went away before night. I was in the house with him; I was alone with him; I don't know how long; there was nothing said about marriage then. I don't remember whether he made any appointment about coming again. He came the next week; I was alone. He visited me once in two weeks; I was not alone with him every time. I don't know how often I rode out with him; it was more than twice; it was five or six times; nobody was with us in the carriage; it was a covered buggy; we rode to Branchport. He broke off his visits in the fall — towards winter. He commenced again the next July; I was then at home; I was alone with him in the evening till after 9 o'clock; I don't know whether it was midnight or not; he went away that night.

Q. Did he come to visit you after that?

This question was objected to by the counsel for defendant on the grounds, 1st. That it is immaterial and irrelevant; 2d. That it was now incompetent, and intended to prejudice the minds of the jury. The court overruled the objection and admitted the evidence, and the counsel for the defendant excepted.

A. He came again next week, and stayed till about 11 o'clock. I was with him in that same front room; I was not alone with him every time he visited me that summer. He did not say what business he had with me in these visits; he did not say before he broke off what his object was; his visits continued until winter, some time. I was alone with him frequently till late at night. I rode out with him that season, quite a number of times; I rode in the evening with him. He kept me company frequently; we stopped at my sister's about three times; I continued out riding with him until nightfall; I don't know how late it was when we got back; I think it was 9 o'clock.

After the witness had been cross-examined at great length, the counsel for the People proceeded to a re-direct examination.

Question by district attorney: When did you first inform Edgar of your situation?

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This question was objected to by the counsel for the defendant, on the grounds, 1st. That it was immaterial and irrelevant; 2d. And the People had exhausted their proof. The court overruled the objection and admitted the evidence; to which decision the counsel for the defendant excepted.

A. In July.

Q. What occurred between you at that time in substance?

This question was objected to by the counsel for the defendant, on the same grounds as the previous question. The court overruled the objection and admitted the evidence; to which decision of the court the counsel for the defendant excepted.

A. I told him that I was in such a situation, and wanted him to marry me. He kept putting me off all the time.

Q. What was his reply?

This question was objected to upon the same grounds as the previous questions, by the defendant's counsel. The court overruled the objection and admitted the evidence; to which decision the counsel for the defendant excepted.

A. He wanted me to wait; he was not ready then, he said. We had a conversation afterwards upon that subject; it was the next week.

Q. What was then said between you?

This question was objected to by the defendant, upon the same grounds as the previous question. The court overruled the objection and admitted the evidence; to which decision the counsel for the defendant excepted.

A. The same thing was said in substance; we had a conversation after that. (The following testimony was taken under the same ruling by the court and exceptions by the defendant.) I don't recollect how long after that, not a great while; it was that summer. I urged him to marry me; he said he was not ready; he wanted me to wait. He said he would be ready in the fall; he did not say anything further then. I don't remember whether I spoke to him or he to me in the next conversation upon the subject; he said something upon the subject of his going away. I don't know whether this was in September or October. He said he was going

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away to be gone three weeks, then we would be married and go west; this was in November. I saw him two nights before he went away. I don't know the time exactly; it was in November that he went. He then said the same that he had before, that he would be back again in three weeks and then we would be married and go west. He said he was going to Rhode Island to see his uncle; was going on a visit. He did leave in November some time, and was gone until July, I think, of this year. During that time, up to this last July, I have not seen him nor heard from him.

Q. Did he at any time after you first told him of your situation, say anything to you as to whether you should tell your mother of your situation?

This question was objected to by the defendant, on the ground that it was, 1st. Leading; 2d. Immaterial and irrelevant; 3d. That the People had exhausted their proof in regard to the matter. The court overruled the objections and admitted the evidence; to which decision the counsel for the defendant excepted.

A. He told me not to tell her, and repeated it afterwards. He gave no reason for this, after the first time when there was intercourse between us, when he urged me it was to do as he wanted me to.

Mrs. Eliza Chissom, the mother of the prosecutrix, and several other witnesses, were then examined in behalf of the People.

The evidence was then closed on the part of the People, and the defendant's counsel moved the court that the defendant be discharged, and that the court should direct the jury to find a verdict of "not guilty," or "acquittal," upon the following grounds:

1st. Upon the same grounds upon which the motion to quash the indictment was made.

2d. That the People had failed to make out a case under the provisions of the statute.

3d. That time was material in a case of this character, and

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the People had failed to prove the offense to have been committed at the time alleged in the indictment.

4th. That it was necessary for the People to support and corroborate the prosecutrix and witness, Mary Chissom, in regard to all the material facts necessary to be proved to make out the offense under the statute.

5th. That the People had failed to support and corroborate the witness and prosecutrix, Mary Chissom. (1.) In regard to the promise of marriage. (2.) That she was an unmarried female at the time of the alleged offense. (3.) That she was an unmarried female of previous chaste character at the time of the alleged offense. (4.) That the defendant seduced and had illicit connection with her under promise of marriage. (5.) That the defendant seduced the said Mary Chissom. (6.) That no legal promise of marriage had been proven in the case. (7.) That the People had failed to prove that defendant was a man within the intention and meaning of the statute. (8.) The promise proved in this case, if there is any, is a conditional one. The promise alleged in the indictment is absolute, and hence there is a variance.

No conviction can be had under the second count, because the promise therein alleged is, that he would marry when requested, and there is no proof of such a promise.

The court denied the motion, and the counsel for the defendant excepted.

Several witnesses were examined on the part of the defense. During their examination the counsel for the defendant offered to prove that the witness and prosecutrix, Mary Chissom's, character for chastity was, by general reputation among her neighbors, bad, which offer was objected to by the district attorney, upon the ground that the evidence is incompetent, and that the defendant, if he wishes to attack the character of Mary for chastity, must do so by specific acts, and that it cannot be shown by general reputation. The court sustained the objection. To which decision of the court the counsel for the defendant excepted.

The defendant also offered to prove that, from general repu-

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tation among the neighbors in the neighborhood where the witness, Eliza Chissom, resided and kept house, and with whom the witness, Mary Chissom, lived, the house kept by the said Eliza Chissom was a house of ill fame.

The district attorney, on behalf of the People, objected to such offer and the reception of the evidence, upon the ground that the same is improper and incompetent.

The court sustained the objection, and refused to receive the evidence. To which decision of the court the counsel for the defendant excepted.

After the evidence on both sides was closed, the counsel for the defendant again asked that the defendant be discharged, and that the jury be directed to find a verdict of "not guilty," on the same grounds as stated on the previous motion. The court denied the motion, and the defendant excepted.

After the counsel on both sides had addressed the jury, the presiding judge charged as follows :

GENTLEMEN OF THE JURY : The statute upon which this indictment is based is one rather peculiar in its provisions, and (as has been stated) up to the time of its passage there was no statute law, whatever, punishing seduction.

Nor was seduction a crime at common law ; but the legislature has deemed the subject of sufficient importance to enact such a law. It is the law of the land, and you are to administer this law as you find it. If a clear case of guilt has been established, then your duty is plain.

There are several leading principles to which we propose to call your attention, without reciting the proofs, for these are as fresh—and probably more so—in your minds than our own. We merely intend to call your attention to such points, and to such proofs under such points, as will aid you in arriving at a just conclusion.

The first point to be shown on the part of the People is this: Was the prosecutrix an unmarried female? There was no testimony, except that of Mary Chissom herself, upon that point. She testifies that she was an unmarried female.

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The next proposition in order is this: Was there a promise of marriage? Because, unless there was a promise of marriage on the part of the defendant, then, although the evidence of the seduction of the prosecutrix be clear, this of itself would not constitute an offense against the statute. The promise of marriage is a condition precedent, and must be proved. Unless the People, therefore, have made out a sufficient promise of marriage, then there can be no conviction. For, although it be conceded that this prosecutrix was seduced, as claimed, yet, if such seduction was not accomplished under a promise of marriage, then it is not an offense under the statute.

The first laboring point in the case will be this: Was there a promise of marriage? Upon the question of the mutuality of this promise, the authorities are somewhat in conflict. By some, it has been held that it should be mutual, *i. e.*, a valid promise; while, on the other hand, it has been held that whether the promise is binding at law or not, if the prosecutrix believed it, and it was the consideration for, or the inducement to, the illicit intercourse, the promise is sufficient.

Now, in respect to this question, we prefer to charge you in the language we have written out: If you shall be fully satisfied from the evidence that the defendant promised to marry the prosecutrix if she would have carnal connection with him, and she, believing and confiding in such promise, and intending on her part to accept such offer of marriage, did have such carnal connection, it is a sufficient promise of marriage under the statute. The evidence upon this point is that of the prosecutrix. She testifies in respect to it. I might refer to her testimony; but, as counsel have commented fully and at length upon her evidence touching this promise and its terms, it will be unnecessary for me to do so. If you find from her evidence that it complies with the definition we have given you—in other words, if the defendant promised to marry her if she would submit to have carnal and illicit intercourse with him, and she, believing such promise to have been made in good faith, and on her part intending to accept such offer of marriage, and then yielded—we say that such a promise is

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sufficient to bring the prosecutrix within the protection of the statute.

But, in respect to this, as well as to every other point, you should be fully satisfied. You should be satisfied beyond all reasonable doubt that there was such a promise made. If you come to the conclusion from the whole evidence, beyond reasonable doubt, i. e., if you have no reasonable doubt that there was such a promise made, the next point to be taken into consideration will be, did he have sexual connection with her? In other words, did he seduce and have illicit connection with the prosecutrix? Now she is the only person who has testified upon that point directly—the only one who has given direct evidence upon that point. If she has testified truly upon that point, there was a sexual connection as stated. But whether she has stated truly, or stated it as it was, we do not undertake to say, but submit it to you for your consideration and determination.

The question of seduction is one of the leading questions in this case. Because, as we before remarked, even though there was a promise of marriage, and yet he did not seduce her, then no offense has been committed. But even if these two propositions are found in the affirmative, still there can be no conviction, unless the prosecutrix is supported by other evidence. Because the statute goes farther, and provides that no conviction can be had upon the unsupported evidence of the female, hence the prosecutrix must be supported. Has she been supported by evidence in respect to a promise of marriage?

The evidence relied upon by the People upon this point is that of her mother, who appears as a witness and testifies that the prosecutrix lived with her at and during the time the defendant called upon Mary. She testifies to you the frequency of these visits and their duration, that he called sometimes in the day time, and more frequently in the evening, and that he stayed during the evening; and she stated to you the length of time that he remained there, and the length of time over which the calls extended. This is all proper evidence, as

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bearing upon the promise of marriage, and it is submitted to you, and you are to say whether you infer from this evidence of the mother that such a promise of marriage was made.

Formerly, in civil cases, in actions for a breach of promise, it was not necessary to prove positively and directly, an absolute promise of marriage. It was sufficient if the circumstances given in evidence were such that the jury might infer a promise of marriage, and we say to you now that this is competent evidence, as bearing upon this question. Does it impress your minds to that extent that you can infer a promise of marriage? If so, it corroborates the prosecutrix.

It is not for us to determine, nor do we intend to give you any direction in respect to the force or strength of this testimony, for you will understand, as well as we, and better too, the proper inference to be drawn from it. You will say what impression this evidence makes upon your minds as corroborating Mary upon the question of a promise of marriage.

Again, this same evidence is competent upon another question — that of seduction, and illicit intercourse. Mrs. Chissom testifies that he was there frequently, and that they occupied the parlor, and were generally alone. She puts them in a position where an act of this kind could be done; and you will say what inference you draw from this testimony, and whether it corroborates Mary upon the point as to being seduced by, and having illicit intercourse with, the defendant.

Right here, it is claimed, on the part of the defendant, that Mrs. Chissom is not entitled to credit; and, in order to impeach her, eight witnesses have sworn in respect to her character in that neighborhood, some of whom say it is not good; others, that it is bad. I think the farthest any of them state in respect to her character for truth is, that they would hate to say that they would not believe her under oath.

On the other hand the People have introduced eight witnesses who have sworn as to her character, all swearing they would believe her under oath. The question of credibility is with you. Her appearance on the stand, the probability of the story she tells, and this proof tending to impeach her charac-

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ter, offered by the defendant, as well as the proof to sustain her, all is competent, all proper to be submitted to you upon the question of credibility; and you will say, upon this whole evidence—her story, its probability, and the evidence introduced on the part of the defendant, and on the part of the People, and her appearance upon the stand, whether she is entitled to your credit. If she is not entitled to your credit, then Mary stands uncorroborated, and there can be no conviction.

Another question to be considered, involves the credit of the prosecutrix as a witness upon the stand. It is conceded here, on the part of the People, that there were some discrepancies in some parts of her testimony. For instance: that she did not go upon Flat street with Bennett; and in another respect: she testifies that she did not go out of the church at a certain time; and Bennett in that respect contradicts her. You will say whether, if at all, this shakes her credibility. Her appearance upon the stand, and her testimony, are before you, and you have a right to judge of her credit, and you will say, therefore, whether she, as a witness, is fully entitled to your credit; and if not fully, to what extent. The question of credibility is entirely with you.

It is claimed on the part of the defendant, that no conviction can be had unless Mary is corroborated, not only in respect to a promise of marriage and seduction, but also that she must be corroborated as to being an unmarried female, and having been of previous chaste character. We advise and instruct you that, in respect to her being an unmarried female, she needs no corroboration. The prosecutrix testifies to her chastity, and if entitled to credit, this is sufficient, and she need not be corroborated as to chastity.

The statute, evidently, was drawn with care, hence it requires that the prosecutrix shall be supported, in respect to the material points; but whether this extends to any other points than the promise of marriage and seduction, has been made a question. Seductions generally take place when the parties are alone, and the legislature, in order to guard parties

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from false charges, required that the female making such charges should be supported by other evidence.

It is important, and necessary to a conviction, that she be an unmarried female, but having testified to it herself, it is not necessary, as before remarked, that she should be corroborated on that point. Were she a married female, this would be matter of defense, and could be taken advantage of by the defendant.

We come now to speak of a question vital to this issue: Upon the whole evidence, was Mary, the prosecutrix, prior to this alleged seduction, a person of chaste character? This is a vital question, because, if the defendant has shown, or if it appears from the whole proof, to your satisfaction, that, prior to the time alleged, she was a person of unchaste character, then she is not entitled to the protection of the statute. A person claiming the protection of this statute must be of chaste character; and, that we may have the definition of the word "chaste," I read its definition, as given by Webster: 1. "Pure, free from unlawful commerce, undefiled; applied to married persons, true to the marriage bed." 2. "Free from obscenity." This is the definition of "chastity," and we think it is a proper one to be applied to this word, as used in the statute. The question recurs: Is the prosecutrix a person of chaste character? Did she, prior to the time alleged, possess a chaste character?

Upon this point there has been a good deal of testimony introduced by the defendant. As we before remarked, we are not going to detail it to you; it is fresh in your minds. You will carefully examine the whole evidence bearing upon this question, and say whether she was a person of chaste character.

"Character," as has been defined by the courts (and we think properly), means "personal virtue;" but it is not necessary that the defendant should prove before you actual connection with any person, in order to establish her want of chaste character. It is sufficient if he prove such a state of facts as will warrant you in the inference that she is not a chaste character.

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The defendant has proved certain specific acts which he claims are unchaste, and asks you, from these acts, to say by your verdict, that the prosecutrix was not of chaste character previous to the alleged commission of this offense. These acts are fresh in your minds, and we need not refer to them. It is sufficient for us to say that they do bear upon the question of chastity, but to what extent it is not our province to decide. This is a question purely for your consideration. It is for you to say whether this evidence is of that character and that force that your minds are led to the conviction that she was a lewd person, or of unchaste character.

Gentlemen, you are practical men, and you are, I think, capable of weighing the force and effect of this testimony, and will therefore give it that force and effect which properly belongs to it.

In conclusion, we need scarcely add that this is an important case. It is the first one tried in this county. It is important to the defendant; it is important to the People; and as you retire to your room for deliberation, you will not allow those deliberations to be influenced by any considerations of sympathy. This case (as I doubt not it will be), should be decided upon the evidence as it appears in the case, as it has been detailed before you, and not by sympathy for the prosecutrix or the defendant. If he is guilty of the offense charged, then, gentlemen, it will be your duty to convict him. But you will not convict unless you are satisfied beyond reasonable doubt upon all the points which we have presented to you; and if you are thus satisfied, your duty, though unpleasant and painful, is nevertheless imperative.

As we have stated, this is an important case. Indeed it is a sad one. We hope your verdict will vindicate the right of the case, wherever it may be found. We submit the case to you.

At the request of the defendant's counsel, we further charge you that the evidence as to Bennett's calling on the prosecutrix should be taken into consideration, as bearing upon the question as to the defendant being a suitor, and upon the

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alleged promise of marriage; and you will say whether or not it repels the claim as to whether he was a suitor, or there was a promise of marriage.

The counsel for the defendant excepted to so much of the charge which is as follows:

"If you shall be fully satisfied from the evidence that the defendant promised to marry the prosecutrix if she would have carnal connection with him, and she, believing and confiding in such promise, and intending on her part to accept such offer of marriage, did have such carnal connection, it is a sufficient promise of marriage under the statute."

The counsel for the defendant also excepted to so much of said charge which is as follows:

"If you find from her evidence that it complies with the definition we have given you — in other words, if the defendant promised to marry her if she would submit to have carnal and illicit intercourse with him, and she believing such promise to have been made in good faith, and on her part intending to accept such offer of marriage, and then yielded—we say that such a promise is sufficient to bring the prosecutrix within the protection of the statute."

The defendant's counsel also excepted to so much of said charge as follows:

"We advise and instruct you that, in respect to her being an unmarried female, she needs no corroboration. The prosecutrix testifies to her chastity, and if entitled to credit, this is sufficient, and she need not be corroborated as to chastity."

The defendant's counsel also excepted to so much of said charge which is as follows:

"It is important and necessary to a conviction that she be an unmarried female; but having testified to it herself, it is not necessary, as before remarked, that she should be corroborated on that point. Were she a married female, this would be a defense."

The counsel for the defendant then asked the court to charge the jury, that, to warrant a conviction, the witness, Mary Chissom, must be supported and corroborated by other

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evidence. (1.) In regard to the promise of marriage made by the defendant. (2.) To the seduction. (3.) To the illicit connection. (4.) That she was unmarried. (5.) That she was of previous chaste character. The court refused so to charge the jury, any further than they had previously charged.

To which decision the counsel for the defendant excepted.

The counsel for the defendant also requested the court to charge the jury, that, to warrant a conviction, the jury must find that there was a legal and binding promise of marriage before the seduction took place.

The court refused, any further than they had previously charged.

To which refusal of the court the counsel for the defendant excepted.

The counsel for the defendant further requested the court to charge, that if the jury should find that the promise of marriage made by the defendant was dependent upon the fact that the witness, Mary Chissom, would have connection with the defendant, and that the promise was not complete until such connection did actually take place, then in such case the defendant could not legally be convicted of the offense charged in the indictment.

The court refused, stating that they should not change their charge made in respect to the subject, and the counsel for the defendant excepted.

The counsel for the defendant further requested the court to charge the jury, that the fact of the defendant and Mary being in the parlor together, without showing them in improper situations, or his taking any improper liberties with her at any time, is not corroborative evidence of the seduction and illicit intercourse, within the meaning and intent of the statute.

To charge which the court refused, and the counsel for the defendant excepted.

The jury found the defendant "guilty," and a bill of exceptions having been made, the record was removed into this court for review by *certiorari*.

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A. V. Harpending, for the defendant.

I. The defendant was indicted at the Yates Oyer and Terminer, in March, 1861, under "an act to punish seduction as a crime" (*ch. 111, Laws of 1848, p. 148*), and convicted at the Yates County Sessions in November last. The following is a copy of the act:

"Any man who shall, under promise of marriage, seduce and have illicit connection with any unmarried female of previous chaste character, shall be guilty of a misdemeanor, and, upon conviction, shall be punished by imprisonment in a State prison not exceeding five years, or by imprisonment in a county jail not exceeding one year; provided that no conviction shall be had under the provisions of this act, on the testimony of the female seduced, unsupported by other evidence, nor unless indictment shall be found within two years after the commission of the offense; and provided further, that the subsequent marriage of the parties may be pleaded in bar of a conviction." (*Laws of 1848, p. 148.*)

Under this statute the word "man," we think, must mean an adult of twenty-one years. It certainly cannot mean an infant nor a mere boy or youth. It seems to be used in contradistinction from either of those. He must be a *man*, capable in law of making a legal and binding promise of marriage, and such an one that the promisee could maintain an action at law upon. Not an infant of sufficient age to lisp out the promise, but a man whom the law declares of sufficient age to make a contract. This view is strengthened by the words, "*promise of marriage*," meaning a contract binding in law between the promisor and promisee, and one for the breach of which on either side an action could be maintained at law. No civil action could be maintained by the prosecutrix in this case against the defendant for a breach of promise of marriage, provided the defendant was, at the time of making such promise, an infant under the age of twenty-one. (*5 Cow. R., 175.*) It is true that in such a case the *onus* of proof would be on the defendant to show infancy; but in this case that *onus* of proof has been changed by the statute, and hence the People

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must show that the defendant was a man of the age of twenty-one. No such proof was given in this case.

II. It is also plain that it must be a legal and binding contract, and in order to be so it must be mutual, otherwise it would be a mere *nudum pactum*. In this case there was no such contract or promise proven. The prosecutrix did not promise or agree on her part to marry the defendant. "He said if I would do so and so he would marry me" (meaning to have sexual intercourse with me). "I told him, no, sir. He had sexual intercourse with me after this conversation." "I don't remember whether there was anything said by me as to my being willing to marry him."

This is the substance of all the evidence given upon this subject, and fails to show such a promise of marriage as the law contemplates. It wants mutuality. She does not agree to marry him, but expressly refuses. The defendant could not maintain an action against the prosecutrix upon these facts for a breach of promise of marriage, were she of age and refused to fulfill. Seduction and illicit connection is not a crime by this act, unless it takes place "*under promise of marriage*," meaning that before and at the time of the seduction and illicit connection there must be a binding and *subsisting* promise of marriage; otherwise the intercourse could not take place under promise of marriage.

The spirit of mutuality must be breathed into it, and it must become a living contract before the seduction and illicit connection take place, or it is no crime; and so the judge held in the well considered opinion of the *People v. Algér* (1 *Park. Cr. R.*, 323). (*Newcomb v. Clark*, 1 *Denio*, 226, 228, 229.)

III. Again, the promise of marriage in this case on the part of the defendant was made to depend upon the fact that illicit intercourse should take place. "He said, if I would do so and so he would marry me." The condition precedent was, that she should have sexual intercourse with him. No action could be maintained by the prosecutrix against the defendant for the breach of such a promise, without showing a compliance upon her part with the condition precedent. The promise of mar-

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riage does not become complete until illicit connection takes place. It cannot be said, therefore, that "seduction and illicit connection" take place "*under promise of marriage*," when such intercourse must take place before and in order to complete the promise. Hence the court erred in his charge to the jury.

IV. Again, the promise of marriage proven in this case was not binding upon the defendant in any view whatever, not even after illicit connection had taken place between the parties, and no action could have been maintained by the prosecutrix against the defendant thereon for a breach thereof, because the same was in contravention of good morals. (5 *Cow.*, 253; 4 *Denio*, 439; 13 *Barb.*, 92.)

Again, suppose the defendant had promised the prosecutrix to pay her fifty dollars if she would have carnal connection with him, and she believing and confiding in such promise, and intending on her part to accept such offer, and then yielded, would it be such a promise in law as the prosecutrix could maintain an action upon against the defendant for the fifty dollars? Clearly not, and as everybody, "females as well as males, are presumed to know the law." (1 *Park. Cr. R.*, 337.) Hence the prosecutrix and the defendant both knew that such a promise as he made was not binding in law, and, therefore, the illicit connection took place without any legal or valid promise of marriage whatever. It is finally settled in England that even a promise made in consideration of past illicit intercourse is void for want of consideration. (*Beaumont v. Reeve*, 8 *Ad. & Ell. N. S.*, 483.)

V. The court erred in rejecting the offer, made by the defendant, to prove that the character of the prosecutrix for chastity was bad by general reputation, and the charge thereon.

If the legislature had intended personal purity only, they would have used the words "*previously chaste*," instead of "previous chaste character." By the use of the word "*character*," was intended and meant the character which the female had formed in the community in which she lived, *for chastity*.

I have always understood the rule of evidence to be in such

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a case as this, and in the kindred cases of rape, seduction, breach of promise of marriage, &c., where chastity was in issue, a want of it could be proven by general reputation, and could not be by specific acts. (*Greenl. Ev.*, vol. 1, § 54; *Id.*, vol. 3, § 214; *Safford v. The People*, 1 *Park. Cr. R.*, 474, 479; *Bouvier's Law Dict.*, vol. 1, p. 221, "Character;" *People v. Jackson*, 3 *Park. Cr. R.*, 391; *Greenl. Ev.*, vol. 2, § 577 [2]; 1 *Burrill's Law Dict.*, 277, "Character;" 3 *Serg. & Rawle*, 387, 338; 26 *Vermont R.*, 279.) And hence we say that the legislature did not intend to change, by this provision, this salutary rule of evidence.

VI. The court erred in rejecting the offer, made by the defendant, to prove, from general reputation, that the witness, Eliza Chissom, with whom the prosecutrix resided, kept a house of ill fame. Because it was a fact tending to show not only a want of personal purity in the prosecutrix, but to repel the idea that she could live for year after year in a house of ill fame, associating with the lascivious, and yet remain chaste and pure.

VII. The prosecutrix must be supported by other evidence as to all the material facts constituting the crime. 1st. As to the promise of marriage. 2d. As to the seduction; that is, the use of arts other than the promise. 3d. As to the illicit connection. 4th. As to her being unmarried; and 5th. As to her previous chaste character. (1 *Park. Cr. R.*, 478.)

This appears from the language of the act, which is, "Provided no conviction shall be had, *under the provisions of this act*, on the testimony of the female seduced, unsupported by other evidence," meaning that she must be supported by "other evidence" as to all of the above material facts, which together constitute the crime; if any one of these is wanting, or she is not supported as to all, "no conviction shall be had *under the provisions of this act*." The prosecutrix was wholly unsupported by other evidence as to any of these material facts. The only supporting proof offered by the People was by the witness, Eliza Chissom, the mother of the prosecutrix, and was only as to the cold and formal attentions of the defendant. No

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asking of consent, no preparation for marriage, and none of the thousand little incidents or circumstances denoting such intention or affection, and none from which a promise of marriage could be presumed. The court, therefore, erred in refusing to direct an acquittal on the close of the People's proof, on the grounds and for the reasons stated, and also erred in the charge to the jury.

VIII. No conviction can be had under this indictment, because the promise proved in this case, if there is any, is conditional. The promise alleged in the indictment is absolute and unconditional, and hence there is a variance. (*The People v. Alger*, 1 *Park. Cr. R.*, 337; *Conrad v. Williams*, 6 *Hill R.*, 444.)

No conviction can be had under the second count, because the promise therein alleged is, that he would marry when requested, and there is no proof of such a promise.

No conviction can be had under the first count, because no mutual promise of marriage is alleged. (1 *Park. Cr. R.*, 334.)

IX. The indictment alleges the commission of the crime on the second day of May, 1860. Time, under this statute, is material, and therefore must be proved as alleged. Hence a variance.

H. M. Stewart (District Attorney), for the People.

I. The indictment charges the offense in the words of the statute, and contains every allegation as required by the statute, and that is sufficient. (1 *Park. Cr. R.*, 454, and cases there cited.)

It was not necessary to allege or prove that the defendant was unmarried, or to prove a valid contract of marriage. This is hereafter considered under Point IV.

It is alleged in the first and second counts that the defendant is a *man*, but that was unnecessary; it would have been sufficient to charge him by a name designating one of the male sex. Age and mental capacity sufficient to commit crime are always presumed, and are matters not of allegation, but of

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defense. (1 *Russ. on Cr.*, 1-25.) Facts which are matters of defense need not be alleged. (1 *Chit. Cr. Law*, 191.)

The second count alleges mutual promises to marry, which was unnecessary (see Point IV), and also states that Mary Chissom was of a marriageable age and condition.

II. None of the objections to evidence and exceptions taken on the part of the defendant were well taken. The materiality and competency of the proof as to the character of the defendant's visits, and that he was her only suitor, is apparent. It goes directly to the promise of marriage, and sustains the witness in her evidence as to an actual promise.

Time is only material when it is made so in the statute, and enters into the nature of the offense. (See Point III.)

The influence the promise had upon her mind, by way of inducing her to consent, was of the very *gist* of the offense. The intercourse must be obtained "under" the promise. In an indictment for obtaining property by false pretenses, it is proper for the prosecutor to state, as a witness, what influence the representations or pretenses had upon his mind by way of inducing him to part with his property. (*The People v. Miller*, 2 *Park. Cr. R.*, 197.) The statutes are identical in regard to this principle. (2 *R. S.*, 861, § 58.)

The evidence as to who was the father of the child, was clearly competent and proper. The witness had just stated, without objection, that she was a mother. The evidence goes directly to the fact of exclusive intercourse with the defendant, and it is important as fixing the time of the intercourse itself. It also shows a motive for the flight and absence of the defendant, as proved, and characterizes it as an evidence of guilt.

Whether Mary had had intercourse with any person other than the defendant has direct bearing upon her previous chaste character, and goes, also, in connection with her other evidence, to prove the intercourse with the defendant.

Proof of the visits after the intercourse, is competent and proper. The defendant in these visits requested Mary to keep

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her situation a secret, not to tell her mother, and agreed to fulfill his promise after a short visit to Rhode Island.

These visits are a continuation of those previous to the intercourse, with knowledge of Mary's situation, and they characterize his flight from and continued absence from the county of Yates, from November, 1860, to July, 1861, as an evidence of guilt. They show an effort to conceal the offense and flee from justice.

An offer was made to prove that Mary's general reputation, among her neighbors, for chastity, was bad.

This evidence was properly excluded. Character, as used in the statute and in the kindred statute punishing abduction, means "actual personal virtue," and not reputation; *personal qualities* which make up the *real character*, and not *public reputation*, which is the *estimate* of character formed by the public. To substitute reputation for character, in this its primary and true sense, would leave any pure and virtuous female, whose reputation had been injured by falsehood and slander, without the protection of the statute. (2 R. S., 4th ed., 850, § 27; *Carpenter v. The People*, 8 Barb. S. C. R., 603; *Crozier v. The People*, 1 Park. Cr. R., 454.)

Under these decisions it would be improper for the People to prove "chaste character" by general reputation, for that would only prove the *public estimate* of character, and not the fact itself.

The last cited case lays down the rule correctly and soundly, viz., that chastity is the general law of society, and, like good character, is to be presumed, and that such presumption may be met by specific acts of lewdness proved on the part of the defendant, and can be met in no other manner. (1 Park. Cr. R., 454.) To allow hearsay evidence on this point would enable the seducer, covertly and secretly, to blast the reputation of his intended victim, and then go on to the attainment of his object with impunity.

Again, if chaste character is "personal virtue," then "unchaste character" is personal impurity, a specific fact, capable of direct proof from witnesses speaking from their own know-

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ledge. In such case, reputation, which is hearsay evidence, is inadmissible. (1 *Phil. Ev.*, 229, and *Cow. & Hill's Notes*, p. 559, note 432.) Evidence of specific acts, and of conduct, is better and higher evidence, and excludes hearsay.

The defendant offered to prove, from general reputation among her neighbors, that the house of Eliza Chissom, with whom Mary lived, was a house of ill fame.

How such proof could have resulted had it been admitted, may be inferred, perhaps, from the fact stated in the charge that eight of her neighbors testified that Mrs. Eliza Chissom was a person of good character. But the evidence was clearly incompetent.

1. Reputation or hearsay evidence is incompetent to establish any specific fact which is, in its nature, susceptible of being proved by witnesses who speak from their own knowledge. (1 *Phil. Ev.*, 229; *Cow. & Hill's Notes*, p. 559, note 432.) That a house is disorderly is to be proven by particular facts. (1 *Russ. on Cr.*, 825.) A house cannot be proved to be disorderly by common reputation. (*Cow. & Hill's Notes*, 562, citing 1 *Serg. & Rawle*, 342, 345.) The fact is susceptible of better proof than hearsay, such as the harboring persons of unchaste character, and that the house is permitted to be a common resort of disorderly persons.

2. Evidence that Eliza Chissom's house was a disorderly one would not necessarily affect the character of Mary for chastity, as she was a minor, residing with her mother.

III. Exception taken on motion to discharge defendant at the close of the People's proofs.

All the questions raised upon this motion are hereafter considered, in argument on the exceptions to the charge and requests to charge, except the 3d ground, viz., that the time of committing the offense alleged in the indictment had not been proved. To this I answer:

1. It is never necessary to prove the offense committed at the precise time alleged, unless time enters into the nature of the offense, as in burglary and arson. (*Barb. Cr. L.*, 397; 1 *Chit. Cr. L.*, 184, 185.)

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The offense is laid in the indictment to have been committed within two years before indictment found; and the offense is proved to have been committed within that time.

It was not necessary to prove affirmatively that the defendant was a man. It is presumed that the defendant was old enough to commit the offense, and it remained for the defendant to prove that he was not.

2. The defendant's manhood was sufficiently proved.

(1.) The defendant, it is presumed, was personally present and under the inspection of the jury.

(2.) It was proved that he went into society and to social parties, labored on a farm, went a long journey, and became a father.

IV. There is no error in the charge.

It is not necessary that the promise should be a legal, valid or binding promise between the parties. It is sufficient that a promise is made, which is a consideration for or inducement to the intercourse. (*Crozier v. The People*, 1 Park. Cr. R., 454.)

1. The term "seduce" is defined as follows: "To draw or lead apart, or away, out of the way or path; to withdraw, to allure, to entice, to mislead." (*Richardson Dic.*, Tit. "Seduce.") "To draw aside or entice from the path of rectitude and duty in any manner, by flattery, promises, bribes or otherwise; to tempt and lead to iniquity; to corrupt, to deprave." *Id.* To entice to a surrender of chastity. (*Webster's Dic.*, Title, "Seduce.")

The statute clearly contemplates that the promise is a wile, a lure and enticement, fraudulent and criminal in its design. This would invalidate its obligation by the civil law, and no male suitor could enforce any civil rights on a promise of this nature.

Crime is a *public wrong*, and is punishable as such even when the acts of the offender are invalid under the civil law. Forging the notes of a bank which has no existence is forgery. (*People v. Peabody*, 25 Wend., 472.) It is sufficient that the paper counterfeited, be not *illegal* in its very frame and be of the semblance of that counterfeited. (2 *Russ. on Cr.*, 344.)

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That a party whose name is forged to paper, has no legal capacity to make it, is no defense. (4 *Park. Cr. R.*, 217.)

The case of the *People v. Alger* (1 *Park. Cr. R.*, 333), does not hold or establish any different rule. All that was decided was, that the special plea, viz., "that the defendant was, at the time of the seduction, a married man, having a family, which fact was well known to the female," was good. The learned judge there concedes that if the female seduced be ignorant of the fact that the accused is a married man, the case is within the act.

A civil action will lie on the promise of a married man, if the fact of the marriage be unknown to the female (*Milward v. Settlewood*, 1 *Eng. Law & Eq. Rep.*, 408), and infancy would be no defense to an indictment under this statute (1 *Park. Cr. R.*, 454), although it would be in a civil suit for a breach of promise of marriage. (5 *Cow. R.*, 475, cited by Mr. Justice PARKER.)

2. The charge is strictly correct, even if the statute requires the promise to be a valid one. A mutual promise on the part of the female seduced is implied, if she yields to the solicitations of the seducer, made under his promise to marry.) 1 *Park. Cr. R.*, 456.)

The third and fourth exceptions to the charge are not well taken.

1. The statute does not contemplate that the female shall be supported or corroborated upon every material fact alleged. It is simply a question of *credibility*, and it is only required, as in the case of an accomplice, that the "support" should extend to some fact or facts which go to prove the offense charged. (2 *Russ. on Cr.*, 963.) In this view, the whole question is with the jury.

2. The support, or corroboration, is, at all events, only necessary to those points which constitute the offense, viz., the promise and intercourse, and is not necessary as to those points which merely indicate the person to be protected, viz., that she was unmarried and of previous chaste character. Chaste character means "personal purity" (8 *Barb. S. C. Rep.*, 603;

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1 *Park. Cr. R.*, 454), and, like good character, is to be presumed ; and as no affirmative testimony is necessary, no support is necessary.

Again : That the female is "*unmarried*" is a fact negative in its character, and not within the positive knowledge of any person but herself, while marriage is a fact susceptible of positive proof. The principles on which rules of evidence are founded require, then, that the evidence of the female seduced that she was unmarried should be deemed sufficient without support, and it should be left to the defense to controvert it if they can ; and the same rule applies in regard to chastity of character.

3. The promise and the intercourse are the only facts which occur in secrecy and seclusion, and there is no good reason why the female should be supported as to the others, which are open, patent and as easily susceptible of proof as any fact in any other case.

In the case of *Safford v. The People* (1 *Park. Cr. R.*, 474), HAND, J., says : " But the facts *constituting the crime* cannot be proved by the seduced alone ; she must be supported by direct evidence or proof of circumstances on all the material allegations of the indictment. However, no point seems to have been taken on the trial on this branch of the case."

Fifth exception to the charge.

It was competent and sufficient to support the witness by circumstantial proof ; so expressly ruled in the case of *Crosier v. The People* (1 *Park. Cr. R.*, 453), and admitted by HAND in the case above cited. Circumstances are usually all the proof allowable in such cases.

4. The first and second requests to charge have been above considered.

5. As to the third request to charge, it was sufficient that the promise preceded the intercourse, and was the inducement to it. (1 *Park. Cr. R.*, 454.)

6. Fourth request to charge.

Evidence of circumstances was proper and competent — the

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weight and force of the evidence was with the jury, and was fairly submitted to them.

7. The fifth request to charge was a request that the court should decide questions, not of law, but of facts, and give their opinion upon their relative weight and importance.

By the Court, CAMPBELL, J. The prisoner, Edgar Kenyon, was indicted at the Yates County Oyer and Terminer, and afterwards tried at the Sessions in that county, and found guilty of the seduction, under promise of marriage, of one Mary Chissom, a young unmarried female, of sixteen years of age. He was indicted under an act passed by the legislature of this State in 1848, and entitled "An act to punish seduction as a crime." There was an act passed in England, as far back as the reign of Henry VII, which made the forcible abduction and marriage or defilement of a woman a crime, provided the woman was an heiress. That statute declared that any person should be deemed and punished as a felon who, for *lucre*, should take any woman, contrary to her will, and be married to her or defile her. If the first taking was against her will, it was still felony even if the subsequent marriage or defilement was with her consent. Still, the filthy *lucre* was the ground of offense. There could be no conviction unless, in addition to the woman, there was money in the case. It must appear that she had real or personal estate, or was an heir apparent.

Our statute was enacted for a higher and nobler purpose; not to prevent or to punish simply what was known commonly as the "stealing of an heiress," but, under threatened punishment, to prevent men from stealing from young and confiding women, under the solemn promise of marriage, that which is often dearer to them than their money or even their life—their personal chastity. Hence, all that the act requires is that she shall be unmarried and of a "previous chaste character." What, then, is meant by the expression, "a previous chaste character?" I answer, in the language of this court in this district, as expressed by Judge WELLES, in *Carpenter v. The People* (8 Barb.):

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"We think the words referred to do mean actual personal virtue; that the female must be actually chaste and pure in conduct and principle, up to the time of the commission of the offense." That case arose under another statute—a statute enacted for the punishment of those who abducted or seduced away females for the purpose of prostitution. It was enacted by the same legislature, and was emphatically a kindred statute. The precise phrase is used in both acts, and, manifestly, what is a correct interpretation of the expression in one act, would also be in the other. But that construction was approved in the 3d district, in the case of *Orozier v. The People* (reported in 1 *Park. Cr. R.*, 453)—a case which arose under the statute which we are considering, and for violating which the prisoner was indicted and convicted. Then, following the language of Judge PARKER, in the latter case, I should say with him, expressing the views of the court in that district, "Chastity is the general law of society. A want of chastity is the exception. It could only be impeached by showing acts of illicit intercourse." It follows, that the offer on the part of the defendant to prove that the character of the witness and prosecutrix, Mary Chissom, for chastity, was, by general reputation, bad, was properly excluded. The question was, not what her reputation for chastity was, but what was her real, her actual character. Was she, in truth and in fact, a virtuous and chaste woman, or was she lewd and unchaste? She had testified to her acquaintance with the defendant; his attention and courtship; his promise of marriage; the illicit intercourse with him; that no other person had addressed her as a suitor; that she was unmarried, and that she had never had sexual intercourse with any person other than the defendant, the prisoner at the bar. It was competent for the defendant to show, if he could, that she was unchaste, and that others beside himself had had illicit intercourse with her. He called his and her companions, and by the testimony of Stephen Bennett and others sought to show that she was lascivious, but failed to satisfy the jury that she was not, in the language of the statute, of "previous chaste character." I am inclined to think that the testimony given

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by Bennett of his attempts upon her virtue, and of her resistance, would tend to satisfy the jury that she fell only when an avowed suitor offered his hand and made the sacred promise of marriage. But be that as it may, it is very clear to my mind that it was not by general reputation, but only by specific acts, that he could impeach her character for chastity. The offer was made, both in reference to her being a witness as well as prosecutrix. If the offer had been made as to both in distinct propositions, it still would have been rightly rejected.

It was expressly held in the late Court of Errors, in *Bakeman v. Rose and wife* (18 Wend. R., 146), that evidence of general reputation that a female witness was a prostitute was inadmissible for the purpose of impeaching the witness. So, too, the offer to prove that from general reputation the house where Eliza Chissom lived, and who was the mother of Mary, and with whom Mary lived, was a house of ill fame, was properly rejected and the evidence excluded. If true, it was a fact which could be proved by specific acts also. The general rule undoubtedly is, that hearsay evidence is incompetent to establish any specific fact which is in its nature susceptible of being proved by witnesses who speak from their own knowledge. If this house was the home of lewd women, and the resort of unprincipled men, and was in truth a house of prostitution, it would very evidently have been in the power of the defendant, who was a frequent visitor there, to have made proof of specific facts tending to show its real character; but he could not show it by general reputation. (See note to 1 Phil. Ev., Cow. & Hill's Notes, note 432.)

I have thus considered one of the provisions of the act — that which requires the female to be of chaste character, as it became necessary to do so in connection with the offer of proof made by the defendant. But the objections made and exceptions taken by the defendant on the trial, were so numerous, and directed to every provision of the statute, that it becomes necessary to refer to them all somewhat in detail. Referring, then, again to the language of the act, "Any man who shall, under promise of marriage, seduce and have illicit connection

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with any unmarried female of previous chaste character, shall be guilty of a misdemeanor," &c., "provided that no conviction shall be had under the provisions of this act on the testimony of the female seduced, unsupported by other evidence." It may be well to bear in mind that there is a marked difference between testimony and evidence. The latter is much more comprehensive than the former — testimony being the statements or the declarations of a witness, and evidence being rather the result or deduction from all the facts established, whether by testimony, by events or by circumstances, by writings, records or other memorials. It is called evidence, saith Coke, because thereby the point in issue in a cause to be tried is to be made evident to the jury, and the evidence to a jury containeth testimony of witnesses and all other proofs to be given and produced to a jury for the finding of any issue joined between parties. (*See Jacobs' Law Dictionary, Title, "Evidence."*)

Now, in the act we are considering, the testimony of the female seduced must be supported by other evidence. Not necessarily the testimony of another witness, as in our statute relating to the crime of treason, where it is required that there shall be the testimony of two lawful witnesses to the same overt act, but other evidence besides the testimony of her upon whom the wrong was inflicted. Proceeding, then, with the provisions of this act, the first of which is, that "any man who shall," &c. Even upon this phrase the defendant raised the question of the sufficiency of the proof to convict, as it did not appear by any proof that he was a *man*. He was in court, present before the jury, and not sued upon a promise to marry, but charged with a crime. If he was old enough to be, and was, the father of the child begotten upon the body of the prosecutrix, under a promise of marriage, I apprehend there can be no doubt that he was a man within the meaning of the statute, and old enough to be punished for the crime. This objection can hardly require any serious discussion.

The female seduced must be an unmarried female. In her testimony in this case, she states distinctly and positively that

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she was unmarried. Is it necessary that in this she should be supported? I think not. On the contrary, if the female were married, in almost every case it would be a fact capable of direct proof. But, in the case before us, the female is supported. It appears by evidence other than her testimony, that she was a young woman — perhaps a better expression would be, a girl — living at home with her mother, scarcely fifteen years of age when the defendant commenced visiting her, and that she was born and had always resided in the same neighborhood. It appears that, on the trial, there must have been present many of her companions, those who would have known if she had been married. The People could not well prove a negative, that is, that she was not married, except by her own testimony. From her testimony and all the surrounding circumstances, was it not evident to the jury that she was an unmarried female? Again, the seduction must be effected under a promise of marriage, and the defendant contends that that promise must be mutual. Conceding this, we may still inquire what is meant by mutual promises to marry. If a man, having paid his addresses to a woman, makes to her an offer of marriage, that is, simply offers to marry her, and she says in reply that she accepts his offer, would not the law imply the promises? In this case, the testimony of the prosecutrix is that the defendant said to her, if she would do so and so, he would marry her, that is, if she would have connection with him. At first she said no, sir; but afterward she assented. In other words, she accepted his offer of marriage. That she so understood it, is evident from her answer to the question as to what influence the promise of marriage had upon her by way of inducement to her to consent to the intercourse. She says: "I thought he was going to have me, and nobody would know it." If he was to have her, she must have understood that she was to marry him. As to the support by other evidence, it appears that the defendant was a frequent visitor at her mother's house, that he waited on her to balls and parties, and took her out frequently to ride, and when the mother spoke to him about keeping company with

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her daughter, he said his motives were good. Surely there was evidence tending to show to the jury that there may well have been a promise of marriage. The mother may have well supposed, from his declarations, that his motives were good; that he was addressing her daughter with honorable intentions, and with a view to marriage.

As to the illicit connection, the fact stands out that the prosecutrix was delivered of a child, and the whole case shows evidence on both sides that there was abundant opportunity for the defendant to have become the father of it, if there were such promises as she has sworn to. The act under which the defendant was convicted does not require that the female shall be supported in every particular, nor even in every important particular. The language is, "unsupported by other evidence." Undoubtedly, in the main features of the case, as to the important points, she should be supported. How direct and how positive and conclusive the supporting evidence should be, is quite another question. In administering such a law, I apprehend no precise rule can be laid down. Each case will be governed, in a great measure, by its own particular circumstances. I have gone carefully over this case. The charge of the county judge was able and elaborate, and, I think, entirely fair and impartial. I do not think, in his charge, or in his refusal to charge, he committed any error in the admission or rejection of evidence.

In my judgment, there is no sufficient ground for a new trial.

Conviction affirmed.

SUPREME COURT. New York General Term, February, 1862.
Ingraham, Leonard and Clerke, Justices.

THE PEOPLE v. CHARLES NOAKES.

An order for the delivery of goods, though not on its face addressed to any person, is the subject of forgery. It is sufficient if the order is of such a character that a person can, by the use of it, be deprived of property.

Where, in an indictment for forging an order, it was charged that the prisoner's intent was to defraud the "Meriden Cutlery Company, and divers other persons to the jury unknown," it was held not to be erroneous for the court to refuse to charge the jury that the Meriden Cutlery Company could not be regarded as the subject of fraud.

Nor was it erroneous in the court to refuse to charge the jury that, if the grand jury knew, at the finding of the indictment, whom the prisoner intended to defraud, he could not be convicted of an intent to defraud persons unknown, where no evidence whatever had been given to show that the grand jury had any knowledge of that kind.

THE prisoner was indicted for forgery. The indictment was as follows.

City and county of New York, ss :

The jurors of the People of the State of New York, in and for the body of the said city and county of New York, upon their oath, present: That Charles Noakes, late of the First ward of the city of New York, in the county of New York aforesaid, on the thirty-first day of August, in the year of our Lord one thousand eight hundred and sixty-one, with force and arms, at the ward, city and county of New York aforesaid, feloniously did falsely make, forge and counterfeit, and cause and procure to be falsely made, forged and counterfeited, and willingly act and assist in the false making, forging and counterfeiting, a certain instrument in writing, commonly called an order, which said false, forged and counterfeited instrument is as follows, that is to say :

"Please send through bearer,

6 dozen 476 table knives,
 6 dozen 477 table knives,
 6 dozen 435 table knives,

6 dozen 476 dessert knives,
 6 dozen 477 dessert knives,
 6 dozen 435 dessert knives.

Charge and send bill to

F. W. J. F. DAILEY & Co.

Please give us lowest price.

We will send another order."

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With intent to injure and defraud the Meriden Cutlery Company, and divers other persons to the jurors aforesaid unknown, against the form of the statute in such case made and provided, and against the peace of the People of the State of New York and their dignity.

There was another count in the indictment for uttering and publishing the order.

The prisoner pleaded not guilty.

The issue was tried in November, 1861, in the Court of General Sessions of the city and county of New York, before JOHN H. McCUNN, City Judge, and a jury.

The district attorney, to sustain the indictment, called the following witnesses:

William Dailey testified that he was one of the firm of W. J. F. Dailey & Co., hardware dealers. On being shown the order described in the indictment, witness said it was not the order of his firm, but was a forgery. Witness did not know the prisoner; never saw him before his arrest.

The order was here presented.

Joseph B. Beadle testified that he was a hardware and fancy goods dealer in the city of New York; he also said he was agent in this city for the Meriden Cutlery Company of the State of Connecticut; that he had been in the habit of dealing with Dailey & Co.; that he had been at the place of business of the "Meriden Cutlery Company," at Meriden, in the State of Connecticut; that "Meriden Cutlery Company" is the name of the company; that it was organized in 1855. Witness said that on the 31st day of July, 1861, some unknown man came to his store and presented this said order; that, believing it was genuine, he delivered the goods mentioned upon its face; the goods sold were worth \$161. Witness added, that within the next ten days after the delivery of said knives, he saw at the store of Samuel Basford several dozen of the same knives he gave upon the order; they were all of the Meriden Cutlery Company manufacture.

Samuel Basford testified that he knew the prisoner; that he bought thirty-six dozen knives of Meriden Cutlery Company

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manufacture; the knives shown to the witness, Beadle, and seen by him, were bought from the prisoner by him only a few days before Beadle came there and saw them; he paid the prisoner \$84 for the thirty-six dozen knives; the thirty-six dozen knives were of the Meriden Cutlery Company manufacture.

Oscar Nathusius, sworn, said he was a member of the firm of Nathusius, Ruggles & Morrison, hardware dealers; that he knew the prisoner; that the prisoner was once (about four or five years before) a clerk for his firm for about three months; that during that time he saw him write; knows his handwriting; that he also saw him write his name, at the request of witness, in the Police Court, on the day of his arrest; that he compared the writing of his name with this order, and from these facts was able to say that the order mentioned and set out in the indictment was, to the best of his knowledge and belief, in the handwriting of the prisoner. The witness was shown the order set out in the indictment, and said it was in the handwriting of the prisoner. The order was then given in evidence to the jury.

It was conceded that the prisoner had always borne a good character, and the case was closed.

The court charged the jury, and the prisoner's counsel asked the court to charge the following propositions, namely:

First. That the instrument set out in the indictment was not upon its face the subject of forgery.

The court refused to charge as requested, but said that the instrument was upon its face the subject of forgery.

Second. That the "Meriden Cutlery Company" could not be regarded as the subject of an intended fraud by the prisoner in the making or uttering this instrument.

The court refused to charge as requested, but said that the "Meriden Cutlery Company" might be properly regarded as the subject of fraud.

Third. That if the grand jury, at the finding of the indictment, knew, and the petit jury at trial knew, from testimony, whom the prisoner intended to defraud in the making and

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uttering this instrument, then the charge in the indictment — that the prisoner intended to defraud “*divers persons to the jurors unknown*” — must be disregarded for variance from evidence.

The court refused to charge as requested, but said that the prisoner, notwithstanding the existence of these facts, might be convicted of an intent to defraud “*divers persons to the jurors unknown*,” as charged.

The prisoner's counsel excepted to each and every refusal by the court to charge each and every of the propositions as requested, and to so much of the said charge as relates to each and all of such propositions.

The jury found the prisoner guilty, and the case was removed into this court by *certiorari*.

S. H. Stuart, for the prisoner.

I. This instrument is not, upon its face, the subject of forgery, and the court erred in refusing so to charge, and in charging that it was, upon its face, a forgery.

It is submitted that this writing is neither an order, warrant, nor request for the delivery of goods :

It is not addressed to any one.

An order is the mandate from one who professes to have control over the property named, addressed to another, who appears to be possessed of the same, and who, from the face of the paper, seems to be under an obligation to obey. The test of a written order for the delivery of goods is that, upon its face, there appears to be a drawer; that, upon its face, there appears to be property over which he has control; that, upon its face, there appears to be a person drawn upon, to whom it must be addressed, and who, from its face, appears to be bound to deliver. (See 1 *Bishop Cr. L.*, §§ 205, 206; *Rex v. Baker*, 1 *Moody*, 231; *Rex v. Church*, 1 *Leach*, 540-544; *Rex v. Mitchell*, 2 *East. P. C.*, 936; *Reg. v. Williams*, 2 *Car. & P.*, 51; *Rex v. Start*, 6 *Id.*, 106; *Reg. v. Thorn*, 2 *Moody*, 210; *Reg. v. Curry*, *Id.*, 218; *Reg. v. Roberts*, *Id.*, 258; *Reg. v. Newton*, *Id.*, 59; *Rex v. Rosencranss*, *Russ. & Ryan*, 161.)

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The only difference between an order and a warrant for the delivery of goods is, that the first commands, and the second authorizes, the same thing to be done. In all else they are alike; the elements of their composition, and the facts necessary to their constitution, are the same. A warrant, instead of a written order, is a written authority from one to another, to do the thing mentioned. Both the authorizer and the authorized must be named in the writing to bind the one and justify the other in the transaction. A bill of exchange or a letter of credit, and instruments of like character, are warrants; they may also, under certain intrinsic circumstances, be orders.

The only difference between an order, a warrant and a request, is, that while the one orders and the other authorizes, the third solicits. It, like them, must be addressed to some one; there must be a party requested as well as a requesting party. There must be some one to whom application is made, as well as some one applying for the favor prayed; each is equally essential to the perfection of the instrument. The absence of the one is as fatal to its legal existence as that of the other.

"Forgery is the false making of an instrument which purports, on its face, to be good and valid for the purpose for which it was created." (1 *Hawkins*, ch. 70, § 7; 2 *East P. C.*, ch. 19, § 45; 1 *Leach*, 407, 547; 9 *Wend. R.*, *Shall's Case*.)

"A false token," says Chief Justice SAVAGE, in the case of *Gates* (13 *Wend. R.*, 311), "is a false writing in the name of another, so framed as to obtain more credit than the mere assertion of the party defrauding."

II. The court erred in refusing to charge, "that the 'Meriden Cutlery Company' could not be regarded as the subject of an intended fraud by the prisoner, in forging or uttering the instrument set forth in the indictments."

An indictment in a case of forgery with intent to defraud must charge the intent to be to defraud either a natural person or some creature of or being known to the law, which has a legal existence corresponding to a natural person.

There is a case in 27 *Vermont R.*, 277, where a prisoner

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(Meade) was convicted of obstructing an engine of a "railroad company," which was reversed upon the ground that the indictment did not aver that the company was a corporation.

Henry Wilber (4 *Park. Cr. R.*, 19) was indicted under an "act for the protection of Gas Light Companies," for defrauding a Gas Light Company. The court (Judge BROWN) held that even here it must appear that the company defrauded was a corporation, in order to convict the defendant.

In the case of *The People v. Chadwick* (2 *Park. Cr. R.*, 163), indicted for having counterfeit bank notes in possession, with intent to utter and cheat the Commercial Bank, the court say, in its opinion, among other things, that if there was no corporation shown to exist, it could not be said that the prisoner intended the fraud charged.

III. The court erred in refusing to charge that, "if the grand jury, at the time of finding the indictment, and the petit jury, at the trial of the same, knew from testimony who was to be defrauded in the making and uttering this instrument, then the charge in the indictment that the prisoner intended to 'cheat and defraud certain persons to the jurors unknown,' must be disregarded for variance from the evidence."

In the case of *The King v. Walker* (3 *Campb.*, 264), the principal felon was described as a person to the jurors unknown. It appeared that he was known to the grand jury at the time they indicted, and the receiver was acquitted for the variance.

The same rule was observed, under like circumstances, in the case of *Rex v. Robinson* (1 *Holt*, 595).

It is said (2 *Hawk.*, 319), that the indictment must be certain as to the party, if known against whom the offense was committed, that the prisoner may be informed as well who he is charged with having injured, as what the offense preferred against him is.

An error in setting forth the name of the injured party is much more serious than an error in setting forth the name of the offender himself, as the former is proper ground for acquittal, in case of variance in the evidence; while the

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latter can only be taken advantage of by abatement. (*Whart. Cr. L.*, 71.)

Where the name of an injured party cannot be ascertained, as where the body of a murdered man is found, who cannot be identified, the indictment may allege the name to be to the jurors unknown. (2 *Hale*, 181.)

To support a description of "unknown," it must appear, said Mr. Sergeant TALFOURD, in the case of *The Queen v. Strand (Car. & Kir.*, 187), from the evidence at the trial, that the name of the party injured could not have been known to the grand jury.

IV. The verdict ought to be set aside for that the prisoner has been convicted of two several crimes — forging and uttering — each a distinct, independent, substantive felony.

Nelson J. Waterbury (District Attorney), for the People.

By the Court, INGRAHAM, P. J. The exceptions relied upon in this case were to the judge's charge. The prisoner was indicted for forgery of an order for the delivery of goods. The prisoner's counsel requested the court to charge the jury that the instrument set out in the indictment was not upon its face the subject of forgery.

All the questions as to this order and the nature of the offense, except the one which is based upon the want of a direction in the order, were raised and decided in *Harris v. The People* (9 *Barb. R.*, 664), and the court there held that such an order was within the provisions of § 33, 2 *R. S.*, 673.

In *The People v. Stearns* (21 *Wend. R.*, 409), COWEN, J., says: "Every instrument in writing which may affect property — for example, an order, a letter, or a mere license — is made the subject of a felonious forgery."

The construction which was given to the crime of forgery, as defined in the thirty-third section, is so sweeping as to cover almost any writing by which another person may be in any way deprived of property, and the cases cited are conclusive on this question. Nor do I think the objection fatal that the order has no special direction. Under the English statute such

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direction seems to have been considered necessary; but that statute is not as broad as ours, and the same necessity for the application of the rule does not apply. It is sufficient if the order is of such a character that another can, by the use of it, be deprived of property. If so, then it may be the subject of forgery.

The next objection is, that the indictment charges the intent of the prisoner to have been to defraud the "Meriden Cutlery Company, and divers other persons to the jury unknown," and that the court refused to charge that the Meriden Cutlery Company could not be regarded as the subject of fraud.

This point was also the subject of consideration in the case of *Stearns*, and in that case in the Court of Errors (23 Wend., 634), the Chancellor says: "The indictment charges that the forged order was made with intent to defraud the Bank of Kentucky, and divers other persons to the jurors unknown. If there is no corporation of that name, it necessarily follows that the indictment is broad enough to reach the unknown individuals who constituted the company."

So in this case, if there is no such corporation as the Meriden Cutlery Company, then the indictment is broad enough to reach the unknown individuals who constitute the company.

The case of *De Bow* (1 Denio R., 9), does not conflict with these decisions, because in that case the indictment charged an intent to defraud the Bank of Nassau, and no other person, although it does conflict with the former decision of the same court in *The People v. Peabody* (25 Wend. R., 472), where it was held that it was immaterial whether the bank really had a legal existence, if the forged instrument *purported* to be issued by an institution authorized for such a purpose, &c.

The third exception was to the refusal of the judge to charge the jury, that if the grand jury knew, at the finding of the indictment, whom the prisoner intended to defraud, he could not be convicted of an intent to defraud persons unknown.

It is sufficient for this objection to say that there was no evidence to show that the grand jury had any knowledge of that kind. A judge is never required to submit to the jury a

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question which has no evidence in the case to support it. On the contrary, it would be error to do so. (*The People v. Rynders*, 12 *Wend. R.*, 432.)

We think the conviction in this case was right, and that the court below should proceed to sentence the prisoner.

The case must be remitted to the court below, and that court is advised to pass sentence upon the prisoner.

SUPREME COURT. Kings General Term, December, 1862.

Emott, Lott and Brown, Justices.

JAMES MCCLOSKEY, plaintiff in error, *v.* THE PEOPLE,
defendants in error.

The mere snatching of a thing from the hand or person of another, without any struggle or resistance by the owner, or any force or violence on the part of the thief, will not constitute robbery.

Where the court instructed the jury that feloniously taking another's property with violence sufficient to constitute an assault and battery would make out the crime of robbery, it was held to be erroneous, and, the prisoner having been convicted under such a charge, the judgment was reversed.

Where the property is not obtained by putting the person in fear of immediate injury to the person, the violence necessary to make the offense amount to robbery must be sufficient to force the person to part with his property, not only against his will, but in spite of his resistance.

THE prisoner was indicted for a robbery, charged to have been committed on Halsey F. Wing, in taking violently from his person four pieces of silver coin of the value of one dollar, and one hat of the value of four dollars.

The prisoner pleaded not guilty, and was tried at a Court of Sessions held in the county of Kings, in March, 1862, before the County Judge and the Justices of the Sessions.

Halsey F. Wing, called by the district attorney, testified as follows: I never knew defendant before the evening in question ;

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he came into White's drinking saloon; think it was about 11 o'clock P. M.; he came in with a young man and had a drink; he then asked if I couldn't treat; I said I supposed so; took a drink with them; I paid for it; started to go; he said I must go with him; took hold of my arm and pulled me out; said he was going down Ryerson street; pulled me with him; asked how much money I had; said not much; he said let me see it; I pulled out some change from my pocket, and held it close in my hand; he said I had more money than that; jumped around in front of me, had one arm around my neck, put his hand in my pocket, pulled out half dollar and a smaller coin and knife; said I could have knife, and handed it back to me; he called me Belknap; said he would be easy with me if I'd give him some money; I asked if he wanted to rob me; I ran up on the stoop and rang the bell; he came up; I got hold of his hands and held him, and kicked against the door; I pushed him off the stoop; he came up again; I pushed him off again; he got up, took my hat and ran away; went to station house, got an officer and had him arrested; he came out of a liquor store in Myrtle avenue, not quite a block from where the difficulty took place.

During the cross-examination of the witness he stated:

The defendant had been drinking that night; didn't consider him intoxicated; I consider a man intoxicated when he staggers from one side of the sidewalk to the other, not otherwise; he put his hand in my right side pocket; he stood in front of me at the time; had hold of me with the other hand around my neck or shoulders; stood so probably fifteen seconds, or perhaps not so long; we walked along together; before that he had hold of my arm; he took a fifty cent piece and another coin; don't know what it was; smaller than fifty cents; he gave me the knife back; witness had some small coin in the right hand holding; don't know what was done with the other; remember I broke loose and ran away from him; I tried to get loose from him whilst he had his hand in my pocket; tried to shove him away with my left hand, I think; am not positive; I shoved with my left or right hand; am not

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positive I shoved him with the other hand; I stepped back from him, or tried to; he, defendant, took the change out of his, witness', right pocket; knew a fifty cent piece and some other change remained; don't know how much I had in my hand; left fifty cent and coin in my pocket; didn't want him to know how much; didn't try to prevent his putting his hand in my pocket; it was there before I knew he intended to do it; I knew when he drew his hand out; he put it in and took it out in an instant; don't remember I said anything at the moment he put hand in or out; I turned round and tried to get in the house; don't know that I stepped in front of him.

Q. What were you doing with your right hand while the defendant had his arm over your shoulder and his hand in your pocket? A. I had some small change in my right hand, holding it. Q. What were you doing with your left hand during this time? A. I don't know. Q. What did he say to you while he had his hand in your pocket? A. Nothing. Q. What did you say to him? A. Nothing. I tried to shove him away with my left hand, I think, I am not positive; I cannot say that I did anything; he took his arm from my shoulder when he took his hand out of my pocket; I am not positive I shoved him with either hand; I stepped back from him, or tried to. Q. Did you do anything to prevent him from putting his hand in your pocket? A. I did not. Q. Did you do anything to prevent him from taking the money out of your pocket? A. No. Q. Did he make any threats? A. No. Q. Were you frightened at the time he took the money? A. No; I did not know but that he was playing or joking with me when he put his hand in my pocket. Q. Then it did not occur to you at the time that he was robbing you? A. No. Q. When did that first occur to you? A. After he took the money and asked me if I hadn't more; he did not injure me in any way; he talked friendly and good naturedly the little way we came together. I walked along with him of my own accord when he pulled me out of the door; I took it to be good natured.

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Re-direct: I had bills about me; I paid for the drinks I took with him in change; he shoved my vest up; had bills in my fob pocket; this was after he took the money out of my pocket.

After other witnesses had been examined, the testimony was closed, and the defendant's counsel requested the court to charge the jury the following propositions, to wit:

1st. That the evidence does not show that such violence was used as to constitute the offense of robbery.

2d. That the facts, as stated by the complaining witness, do not constitute such violence as to bring the case within the definition of robbery in the first degree.

3d. That the violence contemplated by the statute means actual violence, and the laying of the arm over the shoulder, as testified to by the witness, does not constitute such actual violence.

4th. That there is no evidence whatever in the case to constitute the charge of robbery.

5th. That the degree of violence that would constitute an assault and battery, would not necessarily be such violence as to constitute robbery by violence.

6th. That the sudden snatching of the money from the complainant, in the manner described by the witness, as testified to, does not amount to robbery.

7th. That there is no evidence to go to the jury upon the question of robbery.

8th. That there is no evidence to show that the taking was against the will of the complainant.

The court refused to charge each and all of said propositions separately, and the prisoner's counsel excepted separately to each of said refusals.

The court charged the jury, among other things, as follows: That if the jury believed the testimony of the witness, that the prisoner thrust his arm around his neck and thrust his hand in his pocket, and took therefrom the coin or money in the manner testified to, with felonious intent, then he is

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guilty as charged. To which charge prisoner's counsel excepted.

The court also charged the jury that the same degree of violence that would constitute an assault and battery in any case, would be sufficient violence to constitute a robbery by violence to the person. To which charge prisoner's counsel also excepted.

The court also charged the jury, that if they found that defendant committed an assault and battery, with intent to rob, he could be so convicted under the indictment. To which charge the prisoner's counsel excepted.

The court also charged the jury, that feloniously taking the personal property of another, from his person, by putting him in fear of some immediate injury to his person, is robbery, and that if the expression of prisoner, as testified to by witness, "Give me your money and I'll be easy with you," conveyed to his mind fear of some immediate injury to his person, and the prisoner at the same time feloniously attempting to take the money or bills from complainant's person, but did not succeed, that would be an attempt to rob, and he could so be convicted under the indictment. To which charge prisoner's counsel then and there duly excepted.

Prisoner's counsel then requested the court to charge the jury, that there was no evidence of fear, which the court refused to do, and the prisoner's counsel excepted.

The jury rendered a verdict of guilty, and the prisoner was sentenced to imprisonment in the State prison for the term of ten years.

The record was then removed into this court by writ of error.

S. D. Morris, for the defendant.

I. The court erred in refusing to charge the 1st, 2d and 3d propositions, as to the degree of violence necessary to constitute robbery by violence to the person.

In order to constitute robbery in the first degree, the following facts must appear: 1st. That certain property was taken;

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2d. That it was taken with a felonious intent; 3d. From the person or in the presence of the owner; 4th. Against his will; 5th. That they were taken either by violence to the person, or by putting the owner in fear. The 1st and 3d ingredients of this offense are not denied; the 4th and 5th are expressly disproved by Wing himself; and the 2d by fair implication.

II. The gist of the offense of robbery is the *force* and terror. (1 *Hale P. C.*, 532; 2 *East P. C.*, 707; 1 *Russ.*, 869; *R. v. Norris*, 2 *Car. & P.*, 349; *Roscoe Cr. Ev.*, 893.)

No taking by violence will, at the present day, be considered as sufficient to constitute robbery, unless some injury be done to the person (*Lapier's Case*, 2 *East P. C.*, 557), or unless there be some previous struggle for the possession of the property, or some force used to obtain it. (1 *Russ.*, 871; *Lapier's Case*, *supra* *Roscoe*; *Cr. Ev.*, 894, 898; *Moore's Case*, 1 *Leach*, 335; *Mason's Case*, *Russ. & Ry.*, 419; *Roscoe Cr. Ev.*, 419, 899; 2 *Archb. Cr. Pr. and Pl.*)

The violence must precede the taking. (*Barb. Cr. Law*, 144.)

III. The court erred in refusing to charge the jury, "that the degree of violence that would constitute an assault and battery would not necessarily be such violence as to constitute robbery by violence."

1. Any injury whatsoever, be it ever so small, to the person in an angry, or revengeful, or rude, or insolent manner, as by spitting in the face, or throwing water on the person, is a battery. (*Roscoe Cr. Ev.*, 288.)

2. The snatching of a bundle from under the arm in a rude manner, is an assault and battery; but if done with a felonious intent it is not robbery. (*Macaulay's Case*, 1 *Leach*, 267; *Roscoe Cr. Ev.*, 898.)

IV. The court erred in refusing to charge the jury, "that the sudden snatching of the money from the complainant in the manner described by witness, does not amount to a robbery." (*Roscoe Cr. Ev.*, 898; *Macaulay's Case*, 1 *Leach*, 290.)

V. The court erred in charging the jury, "that if they believed the testimony of the witness that the prisoner thrust

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his arm around his neck, and thrust his hand in his pocket, and took therefrom the coin or money in the manner testified to with the felonious intent, then he is guilty as charged."

1. This charge took from the jury the right to say whether the money was taken by Wing's assent or not.

2. It was equivalent to a direction to the jury to convict.

VI. The court erred in charging the jury, "that the same degree of violence that would constitute an assault and battery in any case would be sufficient violence to constitute robbery by violence to the person."

1. The sudden snatching of a bundle out of the hand would be an assault and battery, yet it was holden not to be robbery. (*Macauley's Case, supra.*)

2. "An umbrella was snatched suddenly out of the hand of a woman, as she was walking along the street." The act was clearly an assault and battery, but no robbery. (1 *Russ. on Cr.*, 874, *Am. note C.*)

3. "The mere act of taking being forcible, will not make this offense highway robbery; to constitute the crime of highway robbery the force used must be of such a nature as to show that it was intended to overpower the party robbed, and prevent his resisting, and not merely to get possession of the property stolen; thus, if a man walking after a woman in the street, were, by violence, to pull her shawl from her shoulders, though he might use considerable violence, it would not, in my opinion, be highway robbery, because the violence was not for the purpose of overpowering the party robbed, but only to get possession of the property." (1 *Russ.*, 871, *note C.*)

John Winslow (District Attorney), for the People.

I. All the propositions involving questions of fact were properly left to the jury by the court. And all requests of counsel for defendant to take such questions from the jury were rightly refused.

The first, third, sixth, seventh and eighth propositions, which the defendant's counsel requested the court to charge,

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involved questions of fact, which should be left to the consideration of the jury.

II. The proposition charged by the court, "that if the jury believed the testimony of the witness, that the prisoner thrust his arm," &c., &c., "*in the manner testified to, with the felonious intent, then he is guilty as charged,*" was, in effect, only saying to the jury that if they believed the testimony of the complaining witness, the case for the People was made out, and the defendant must be convicted.

III. The next proposition charged by the court, as to the degree of violence necessary, with the other elements that make up the offense, is correct.

The court on this point only said, in effect, that if all the other conditions required by the statute to constitute robbery, such as taking the property against the will, &c., are proved, then the violence that would make assault and battery would be sufficient in the case at bar.

IV. The next proposition charged, as to fear, is of no importance here, inasmuch as the jury found the principal offense.

V. The facts testified to by the complaining witness, Mr. Wing, clearly establish the offense charged in the indictment, and were properly submitted to the jury.

By the Court, EMOTT, J. The Revised Statutes define robbery in the first degree to consist in feloniously taking personal property of another from his person or in his presence against his will, by violence to his person, or by putting such person in fear of immediate injury to his person. (2 R. S., 677, § 55.) The common law definition of robbery was the same. (4 Bl. Com., 243; 1 Hale Pl., vol. 1, ch. 46; 2 East Cr. Law, ch. 16, § 124, seq.) The mere snatching anything from the hand or the person of any one, without any struggle or resistance by the owner, or any force or violence on the part of the thief, will not constitute robbery.

In *Gascoigne's Case* (Leach, 313; East Cr. Law, vol. 2, p. 709), the prisoner snatched some money out of the pocket of a

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woman whom he was conveying to prison on a criminal charge. The prisoner was not a constable, but attended the police office as a runner. He was convicted of robbery, and the conviction was sustained on the ground, which was proved, that he had violently forced the woman into a coach and handcuffed her, with the felonious intent of getting her money, and the direction to the jury at the trial put the case upon this exclusively. The cases which are often cited of taking an ear ring, which was held to be a robbery when it was taken with such violence as to lacerate the ear of the wearer, or a diamond hair ornament tearing out with it a part of a lady's hair from her head, are illustrations of the rule as to the degree of violence necessary to constitute the offense of robbery. (*Leach*, 238.)

The court below, in the present case, instructed the jury in effect that feloniously taking another's property with violence sufficient to constitute an assault and battery, would make out the crime of robbery; and again, that if they believed the story of the principal witness, the offense was made out.

In these instructions the judge was in error. In the cases to which I have referred, as well as in many others to be found in the books, the snatching the property was sufficient to constitute an assault and battery, yet that alone did not make the felonious taking more than a larceny. The property must be taken by violence to the person, which means more than a simple assault and battery. The violence must be sufficient to force the person to part with his property, not only against his will, but in spite of his resistance. The rule of law laid down by the court below went farther than the authorities justify, and the application of the rule to the facts was also incorrect.

The proof showed that the prisoner took the money which he stole out of the prosecutor's pocket, while they were walking together in a friendly manner.

No more force was used than sufficient to pull the money out of the pocket of the witness.

Both the men had been drinking, and the prosecutor, at the

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time of the act, evidently considered and treated the prisoner's conduct as a joke. He made no resistance, and yielded neither to force or fear. If he was led to entertain the idea that the prisoner intended to rob him, or to any fear or apprehension of violence or injury from him, it was not, as he himself states, until after this offense was committed.

Under these circumstances, the violence to the person in taking the property, which is the essential element of robbery, was wanting, and the prisoner's offense was simply a larceny.

The judgment of the Court of Sessions must be reversed and a new trial ordered.

SUPREME COURT. Kings General Term, December, 1862.

Emott, Lott and Brown, Justices.

JAMES McCLOSKEY, plaintiff in error, v. THE PEOPLE,
defendants in error.

It is a good ground of challenge to the array, that certain of the jurors had not been summoned by any legal authority, and that their names had been put upon the list of jurors by the clerk of the court, at their request, without any order having been entered requiring such jurors to serve; and when such a challenge, interposed in behalf of a prisoner on trial for felony, was overruled by the court, on error, the judgment was reversed.

THE prisoner was tried in the Court of Sessions of Kings county, in May, 1862, on an indictment which charged him with having committed a rape on the body of Mary Anderson, a plea of "not guilty" having been interposed to the indictment.

Before the commencement of the trial, the prisoner, by his counsel, challenged the array of jurors called to try said issue, upon the following grounds, to wit: That Willard William Day, and other jurors whose names appeared upon the list of jurors, had not been summoned as jurors to serve in the

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Court of Sessions, but that their names were put upon the list of jurors by the clerk of the court, at the request of the jurors themselves, without having been summoned to appear for said term by the commissioner of jurors, and without any order of the court being entered requiring such jurors to serve, which challenge defendant, by his counsel, offered to verify by proof.

Whereupon the district attorney suggested that if any juror had been added, that was no ground of challenge to the array, but of personal challenges to such jurors being sworn. The court so ruled, and the defendant's counsel excepted.

The trial then proceeded, and resulted in the conviction of the prisoner, who was sentenced to imprisonment in the State prison for ten years.

The record was then removed into this court by writ of error.

S. D. Morris, for the plaintiff in error.

John Winslow (District Attorney), for the People.

By the Court, EMOTT, J. The prisoner, by his counsel, before the commencement of the trial, interposed a challenge to the array of jurors, on the ground that certain of the jurors had not been summoned by any legal authority; that their names had been put upon the list of jurors by the clerk of the court, at the request of those persons themselves, without their having been summoned as jurors, and without any order of the court being entered, requiring such jurors to serve; and offered to verify the challenge by proof. The district attorney admitted the truth of the challenge, but demurred to it in point of law, insisting that the facts stated were no ground of challenge to the array, but of a challenge to the polls in the case of any or each of such jurors, if he should be drawn upon the jury to try the prisoner.

The court sustained the district attorney, and overruled the challenge, and the prisoner's counsel excepted.

The statute (2 R. S., 738, § 3) requires that twenty-four jurors duly drawn and summoned should appear, not impaneled in any other cause, or otherwise disqualified, and

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that the ballots containing their names should be placed in the box from which the jury is to be drawn, before commencing the trial of any indictment.

It is not denied that the jurors specified in this challenge were not duly summoned, and were not competent jurors.

A defect in summoning a jury has always been ground of a challenge to the array, as where the array was returned by two coroners only, when there were four in office, or by a bailiff and not the sheriff. (*Trials per Pais*, I, 168.) So it was a good challenge to the array that the sheriff put a juror into the panel at the request or selection of a party, or out of favor to him. (*Id.*, 169.) The same authority, at page 189, says, that the objection that a juror had been impanneled, or summoned, at the request of a party, being a good challenge to the array, cannot be made a challenge to the jurors. The present objection is clearly to be taken against the array, and if not interposed in that form could not be cause of challenge against individual jurors. It does not appear but that these jurors were competent in point of property and the other requirements of the law, and a challenge "*propter defectum*" would not be against any single juror because he had not been duly summoned, if his name were found upon the panel returned to the court. It might be evidence to sustain a challenge to the poll, of the description called by the old writers "*propter affectum*," that the juror was selected or summoned at the request of a party; but even this challenge would only go to favor, and might be overruled upon trial.

A defect, or a violation of the statute, in the manner in which the jury list is made up, must be taken advantage of by a challenge to the array, and not to the person of the juror.

Such a defect as was here alleged, that certain of the jurors were not summoned by any authority whatever, but were put upon the list by the clerk of the court at their own request, is a good ground of principal challenge to the array. The result to a prisoner of refusing such a challenge would be, that he would be compelled to go to trial with a jury improperly summoned, without the legal guaranties of impartiality and

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competence. To protect himself against jurors thus obtained, he would be driven either to exhaust the privilege of peremptory challenges which the law gives him, or to risk his rights upon a challenge to the favor in the case of each juror, upon which, what would be good cause of principal challenge to the array, would be merely evidence, and that not the most direct, of favor or partiality in the juror.

In the case of *The People v. McKay* (18 Johns. R., 212), the court held that the want of a venire appearing upon the record would be sufficient to arrest the judgment. Probably the present objection, if it appeared on the record, would have the same effect; but having been brought to the notice of the court below by the prisoner's challenge, it should have been sustained by them, and it was a fatal error to overrule it.

The judgment must be reversed.

SUPREME COURT. New York General Term, September, 1862.
Ingraham, Barnard and Clerke, Justices.

THE PEOPLE v. JACOB FAUERBACK.

To authorize a conviction under the act passed April 23, 1862, entitled "An act to prevent the adulteration of milk and to prevent the traffic in impure and unwholesome milk," it is necessary to aver in the complaint or indictment, and to prove on the trial, that milk was adulterated with the view of offering it for sale or exchange. A charge that the defendant had adulterated milk, without stating the object of such adulteration, is insufficient.

Whether mixing water with milk is an adulteration within the meaning of the statute — *Quere?*

THE defendant had been tried and convicted, before a Court of Special Sessions in the city of New York, of an offense under the statute (*ch. 467 of the Laws of 1862*).

The conviction was brought before this court for review, and the facts are sufficiently stated in the opinion of the court.

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By the Court, INGRAHAM, P. J. The defendant was arrested, tried and convicted before the Court of Special Sessions, under the act to prevent the adulteration of milk, &c., passed April 23, 1862.

The charge against the defendant is, that "at the time of his arrest he was adulterating the milk with water which he had in one of the cans in his wagon." The return is, that "the charges of the complaint were sustained by evidence, according to the tenor of said complaint;" that "the prisoner's counsel objected to any evidence of weakening milk by water, on the ground that the statute did not include such an act." The prisoner was fined \$50.

It admits of some doubt whether mixing water with milk was intended by the terms, "to adulterate milk." The evident intent of the statute was, as stated in the title of the act, to prevent the traffic in impure and unwholesome milk. Whether the addition of water to milk, without any other ingredient, renders it impure or unwholesome, is certainly not so clearly settled as to enable a court so to find without some evidence to establish that fact. At any rate, there should be evidence furnished to the court, to satisfy them that the additions were of such a character as would adulterate the milk, or render it impure or unwholesome.

It is not for the court to say that such an effect would be produced by adding water, without any evidence on this point. If the legislature had so intended, they would have made the offense to consist of any mixture whatever being made with the milk. Whether the effect of such a mixture is to adulterate the original article, is a question of fact to be decided upon evidence, and not to be held as a matter of law.

In the present case, however, the return does not show any state of facts to warrant a conviction for any offense. All the evidence in the case that is submitted to us is, that the prisoner was adulterating milk with water which he had in a can in his wagon. What quantity of milk he had, for what purpose it was to be used, or what the employment of the prisoner was, does not appear. I do not understand that the law

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prevents any one from mixing milk and water together, unless it is done with the intent of offering it for sale or exchange. This is just as necessary to be proven in order to make out the offense, as it is to prove the adulteration. Such intent may be inferred from the quantity of milk, the mode of carrying it, the employment of the prisoner or his declarations, but surely the court should require some evidence, both of adulteration and of the purpose of the prisoner as to the sale of the adulterated article, before a man should be convicted of an offense for which he might be sentenced to fine and imprisonment without limit.

We think the evidence did not warrant the conviction, and the charge in the complaint was not a charge of the offense stated in the statute, without an allegation that the prisoner intended to offer the article for sale after the adulteration.

The judgment should be reversed.

SUPREME COURT. New York General Term, May, 1862.

Ingraham, Leonard and Clerke, Justices.

TOMLINSON and SMITH, plaintiffs in error, v. THE PEOPLE,
defendants in error.

On the trial of an indictment for having in possession a counterfeit bank note, with the intention of passing it, it is no defense that the bank note is not set forth in the indictment, and that no reason for omitting to set it forth is assigned in the indictment.

When a request to charge contains two propositions, one of which is right and the other wrong, it is not error in the court to refuse to charge as requested.

THIS case came before the court on writ of error. By the return, it appeared that an indictment in the following form was found in the New York General Sessions, against the plaintiffs in error:

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"City and County of New York, ss:

The jurors of the People of the State of New York, in and for, the body of the city and county of New York, upon their oath, present:

That William Smith, late of the first ward of the city of New York, in the county of New York, aforesaid, and John Tomlinson, late of the same place, on the thirteenth day of August, in the year of our Lord one thousand eight hundred and sixty-one, with force and arms at the ward, city and county aforesaid, feloniously had in their possession a certain forged and counterfeited negotiable promissory note, for the payment of money, to wit, the sum of five dollars, commonly called a bank note, purporting to have been issued by a certain corporation or company, called the Judson Bank, duly authorized for that purpose by the laws of the State of New York, a further description of which said last mentioned forged and counterfeited negotiable promissory note, for the payment of money, is to the jurors aforesaid unknown, with intention to utter and pass the same as true, and to permit, cause and procure the same to be so uttered and passed, with the intent to injure and defraud one Charles Meyer, and divers other persons to the jurors aforesaid unknown, he, the said William Smith and John Tomlinson, then and there well knowing the said last mentioned forged and counterfeited promissory note, for the payment of money, to be forged and counterfeited as aforesaid, against the form of the statute in such case made and provided, and against the peace of the People of the State of New York and their dignity.

NELSON J. WATERBURY, *District Attorney.*

On the 11th day of September, 1861, the prisoners were arraigned in court and pleaded not guilty.

The issue so joined came on to be tried on the 24th day of September, 1861, before JOHN H. McCUNN, city judge, and a jury. The prosecution called as a witness,

Charles Meyer, who, being duly sworn, testified as follows: On the 13th August, 1861, prisoners William Smith and John

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Tomlinson came into my store and asked for drinks; I gave them drinks, when Smith gave me a five dollar bill in payment and to change for drinks; I was suspicious of said bill, and went out and had it examined by a police officer; I then went back to the store and returned said bill to said Smith; it was a five dollar bill on the Judson Bank, Ogdensburgh.

Prisoners' counsel objected to any evidence being given of the bill, as it was not set out in the indictment, nor any reason alleged in said indictment why it was not set out. The court overruled the objections, and the prisoners' counsel then and there duly excepted.

Cross-examined: There were ten or twelve people in my store at the time; I heard Tomlinson say, "Show the bill to this man to see if it is bad," pointing to a man standing by.

Patrick Tuile was then called and sworn for the prosecution. He testified as follows: I am a member of the Metropolitan Police; on the 13th August Mr. Meyer came outside his store and showed me a five dollar bill on the Judson Bank; it was, I believe, a counterfeit bill; I examined it by the light of a lamp outside the store.

Counsel for prisoners objected to the officer testifying as to the alleged forgery, as he was not an expert, nor acquainted with the signature of either of the officers of the said bank, nor was any bill produced in evidence to justify his testifying concerning it. The court overruled the objection, and counsel for prisoners excepted.

Witness continued: I then went into the store and arrested prisoners; I saw Mr. Meyer hand Smith the bill, and Smith held it in his hand, and when I attempted to arrest Tomlinson, he put the bill into his mouth and swallowed it.

Counsel for prisoners objected to the witness testifying anything as to the destruction of the bill, as there was no averment in the indictment that the bill was destroyed; but the court overruled the objection and admitted the evidence, and the prisoners' counsel excepted.

Witness continued: The bill Mr. Meyer showed me was, I

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believe, on the Judson Bank of Ogdensburgh, State of New York, and was a five dollar bill.

Counsel for prisoners objected to the officer testifying to any description of the bill, as the bill was not produced, nor was there any averment in the indictment of the destruction of the bill, or any reason given why it could not be produced, or a full description of said bill given; but the court overruled the objection and admitted the evidence. Whereupon prisoners' counsel excepted.

Cross-examined by counsel for prisoners: I have only had one case of counterfeiting before this; I have not been employed by the police department in cases of forgery; I am not an expert in these cases; I have no knowledge of the signature of any of the officers of the Judson Bank of Ogdensburgh; I don't know that I ever saw a bill on the Judson Bank before that day; I have been in business (grocery business) and know something of money.

Counsel for prisoners then moved that as the officer was not competent to testify as to the alleged forgery, his testimony in that respect should be struck out; but the court denied the motion. Whereupon defendants' counsel excepted.

Witness continued: The bill Meyer showed me I believe to be a forgery; I examined the bill by gas light; had it in my hand; it was a counterfeit bill.

The prosecution then rested. Whereupon the counsel for the prisoners requested the judge to charge the jury that unless there was evidence of the forgery on the Judson Bank, they must acquit, and that there was no evidence of forgery on that bank. The judge refused so to charge, and the defendants' counsel excepted.

Counsel for the prisoners then requested the judge to charge the jury that, unless there was evidence that the alleged note was signed by some person or persons as officers, or purporting to be officers of the Judson Bank of Ogdensburgh, without which it could not be a bank note, or an instrument in the form or similitude of a bank note, they could not convict. The judge stated the jury must so find the facts in order to

convict the defendants. Whereupon the counsel for prisoners excepted.

Counsel for prisoners then requested the judge to charge the jury that, unless there was proof that such a bank as that laid in the indictment was in existence, they could not convict; but the judge declined so to charge. Whereupon prisoners' counsel excepted.

The judge, amongst other things, charged the jury, that the *onus* of proving the non-existence of the bank was on prisoners, for the reason that said bill, on its face purporting to have been issued by the Judson Bank, was sufficient evidence of the existence of that bank, without other proof of that fact. To this portion of the charge, the counsel for the prisoners excepted.

The jury then considered the case and rendered a verdict of guilty. Whereupon the counsel for the prisoners moved, in arrest of judgment, that the indictment was bad for not averring the reason which made the note in question "unknown." The indictment merely avers, "a bank note purporting to have been issued by a certain copartnership, "or company, called the Judson Bank, and to the jurors aforesaid unknown," but is bad and insufficient for not setting out the reason it was unknown.

The judge overruled the motion, whereupon prisoners' counsel excepted.

The prisoners were sentenced to imprisonment for five years in the State prison.

William F. Howe, for plaintiffs in error.

First. The note in question was not set out in the indictment, nor was any reason assigned in said indictment why it was not set out. Therefore, the court erred in admitting the evidence of Charles Meyer, as to the description of the note. (*People v. Kingsley*, 2 Cow. R., 522.)

Second. The court erred in admitting the evidence of Patrick Taita, who, not being an expert in the detection of counterfeit money, nor acquainted with the signatures of the officers

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of the Judson Bank, was not competent to testify to the character of the alleged forged note.

Third. The court erred in admitting Taite's testimony as to destruction of the note, there being no averment in indictment that the note was destroyed.

Fourth. The court erred in permitting the officer to testify to a description of the note, as the bill was not produced in evidence, and as there was no averment in the indictment of its destruction, nor any reason given why it was not produced.

Fifth. The court erred in not granting the motion of plaintiffs' counsel to strike out Taite's testimony, on the ground that he was not an expert in the detection of counterfeit money, and had no knowledge of the signature of any of the officers of the Judson Bank.

Sixth. The court erred in refusing to charge the jury, as requested, that unless there was evidence of the forgery of a note on the Judson Bank, they must acquit; and, also, in refusing to charge that there was no legal evidence of the note in question being a forged note upon the Judson Bank.

Seventh. The indictment is bad, for not excusing, by proper averments, the omission to set out the note, and for not stating the reason why the note in question was unknown.

It should have alleged the loss or destruction of the note as a reason why it was not set out in the indictment and exhibited in court.

It is essentially necessary that every indictment for forgery should set forth the instrument charged as fictitious, in words and figures. (2 *Leach*, 808; 1 *East's Reports*, 180; 3 *Chitty's Criminal Law*, 1039.) Or the omission must be excused by proper averments. (8 *Mass. R.*, 110; 3 *Carr. & Payne*, 591.)

Again, if the instrument was lost, secreted or destroyed, the indictment should have alleged its loss, secretion or destruction. (*People v. Bagley*, 16 *Wend. R.*, 58.)

Eighth. All the testimony as to the alleged forgery, and of the description of the note, was improperly admitted, as the indictment gave no description of the note, nor averred any reason why it was not described.

The court erred in denying counsel's motion in arrest of judgment.

S. B. Garvin, for defendants in error.

By the Court, CLERKE, J. No doubt the rule of the common law was, that, on an indictment for forgery or for uttering forged paper, it was generally necessary that the instrument alleged to be forged should be set forth in words and figures; and where this was omitted, the cause of the omission must have appeared in the indictment. In cases, for instance, similar to the present, where the instrument had been destroyed by the prisoner, it could not, of course, be set forth precisely in words and figures; but it was essential that the cause of the inability to do this should affirmatively appear in the indictment. (*The People v. Kingsley*, 2 Cow. R., 522.) The reason alleged for setting out the instrument with this particularity was, to enable the court to see that it was one of those instruments which the law declared to be a crime falsely to make or knowingly to utter. I do not see, however, that any such particularity was necessary for that purpose. I should think, if the denomination of the bill and the name of the bank or the individual whose name was forged were set forth, that it would enable the court sufficiently to ascertain, at the trial, whether the offense of forgery, or uttering said bill, had been committed. In some rare instances the omission may interfere with the proper preparation of the prisoner's defense; but I am strongly inclined to suspect that this rule arose from the extreme caution with which judges tried prisoners, who, if found guilty, would be liable to the punishment of death. For this was the punishment, for a long series of years, attached to forgery; and it was difficult for our courts and juries to avoid the belief that the punishment was too severe for the offense. Consequently, when the penalty of death for this offense was abolished, the necessity of this particularity in the description of the instrument was repealed, so that, by the statute of 2 and 3 William IV, ch. 128, it is sufficient to describe the note as in a case of larceny. Accordingly, in *Rex v. Burgess*

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(7 *Carr. & Payne*, 490, 32 *Eng. Com. L. R.*, 728), it was held, under this statute, that it was unnecessary to set out the date of the instrument. It was held in *Rex v. James* (7 *Carr. & Payne*, 558, 32 *Eng. Com. L. R.*, 755), that in a count for forgery under the same statute, it was sufficient to charge that the prisoner "did forge a certain promissory note for the payment of £50." There are many similar cases in recent English authorities. No act similar to that of William IV has been passed by our legislature. I refer to it only for the purpose of showing that the particularity required by the common law was deemed a matter of form; and if the description minutely setting forth the instrument in words and figures was a matter of form, much more was the excuse for not conforming to this rule a matter of form. If it turned out on the trial, as in the case before us, that the prisoner had destroyed the instrument, how was he prejudiced by omitting in the indictment to state the reason why the instrument was not described precisely in words and figures? The defendant's own conduct furnishes the very best reason for the omission, and the mere statement of that conduct in the indictment could have been of no benefit to him, and could not have aided the administration of justice at the trial.

The omission, therefore, being the omission of a statement which must be deemed in this case, at least, a matter of form, is cured by the provision in the R. S., which declares that "no indictment shall be deemed invalid, nor shall the trial, judgment, or other proceedings therein be affected by reason of any defect or imperfection in matters of form, which do not tend to the prejudice of the defendant." (2 *R. S.*, 728, § 52.) This provision did not exist at the time of the decision in *People v. Kingsley* (2 *Cow. R.*, 522), to which I have already referred. The only provision then existing, relating to the strictness of the common law in regard to omissions in indictments, related only to the words, "with force and arms." This was afterwards enlarged by the revisers in that part of the Revised Statutes above quoted.

The only other objection taken by the counsel for the

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plaintiff in error, that has any semblance of plausibility, is presented in his sixth point. If the judge was asked to charge the jury that unless there were evidence of the forgery of a note on the Judson Bank, they must acquit, he would have erred if he refused so to charge. But this request was accompanied as a part of the same proposition and sentence with the words, "and that there was no evidence of forgery on that bank."

The judge was correct in declining to put this proposition to the jury. Although the note was not produced, there was some evidence on the subject, and it was for them to determine its weight and credibility.

There was evidence against both defendants to enable the jury to pass upon their guilt.

The judgment should be affirmed.

Judgment affirmed.

SUPREME COURT. New York General Term, September, 1862.
Ingraham, Barnard, and Clerke, Justices.

HENRY DUFFY, plaintiff in error, v. THE PEOPLE, defendants
in error.

Though a confession made by a prisoner under promise of favor cannot, as a general rule, be given in evidence against him, yet if it lead to the discovery of a material fact, so much of the confession may be proved as relates strictly to the fact discovered.

Where a prisoner, charged with stealing a watch, induced by a promise to get him out of difficulty, told the officer in whose custody he was that the watch was at the pawn office, and the officer went to the pawn office and found the watch, which was identified on the trial by the owner, it was held that the confession made to the officer was properly admitted in evidence.

Where a case depends entirely on the positive testimony of witnesses for the prosecution, and not on the effect which the jury may give to circumstantial evidence, it is not erroneous for the court to charge the jury that, if they believe the witnesses for the prosecution, it will be their duty to render a verdict of guilty.

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THIS case came up on a writ of error to the New York General Sessions, where the prisoner was convicted of larceny.

The questions arising on the trial are sufficiently set forth in the points made by counsel, and in the opinion of the court.

S. H. Stuart, for the prisoner.

I. The court erred in admitting officer Clark's evidence of the finding of the (stolen) watch, in consequence of what the prisoner had said to him about it, after arrest, under promise of favor.

II. The court erred in charging the jury as follows, viz.: "If you believe the witnesses for the prosecution, it will be your duty to render a verdict either of robbery, or of larceny from the person, or of grand or petit larceny, and it will be for you to say which."

Verdicts in each of the following cases were reversed by this court, for error in the charges, which were as follows, viz.: "If you believe the witness, the case is within one of the degrees of manslaughter, and it is for you to say which." (*People v. Pfomer*, 4 *Park. Cr. R.*, 558.) "The first two witnesses testify to a state of facts which, if true, establishes a larceny by the prisoner, and renders it incumbent on the jury to convict." (*The People v. Brien*, 4 *Park. Cr. R.*, 380; *United States v. Fenwick*, 5 *Cranch*, 562, and authorities there cited.)

Nelson J. Waterbury (District Attorney), for the People.

I. Evidence of *what was done* in consequence of the prisoner's statement about the watch, was properly admitted. (*Roscoe's Cr. Ev.*, 50; 1 *Phil. Ev.*, 4th *Am. ed.*, 554; 2 *Russ. on Cr.*, 863; *Rex v. Griffin*, *Russ. & Ryan*, 151.)

It has been doubted whether confessions, otherwise inadmissible, may be given in evidence when accompanied by the delivery of property; but the admissibility of the acts done is submitted as an elementary principle. (*Rex v. Warrickshall*, 1 *Leach*, 268.)

In *Regina v. Gould* (9 *Car. & Payne*, 364), where the question

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was the same as that asked in this case, the court, TINDAL and PARKE, JJ., admitted both the acts done and the declaration.

Both were also admitted, after full discussion, in *Commonwealth v. Knapp* (9 Pick. R., 495, 911).

It is submitted that, as to the admissibility in evidence of the acts simply, there can be no doubt.

II. The charge of the court was altogether unobjectionable.

1. It was equivalent merely to saying that the prosecution had proved enough to "go to the jury."

2. The facts admitted of no construction or diversity of interpretation; they amount in law to the crime charged, and the court was bound so to charge.

By the Court, CLERKE, J. I As to the objection that the court erred in admitting the evidence of the policeman (Clark) relative to the stolen watch, which he found in consequence of what the prisoner had said to him after arrest, and under promise of favor, it is, indeed, the unquestionable rule, that confessions obtained under promises of favor are inadmissible. And in the case of *Richard Harvey*, Lord ELDON, when Chief Justice (2 East P. C., 658), said he would direct an acquittal, unless the fact itself proved would have been sufficient to warrant a conviction without any confession leading to it, and, in conformity with this, he directed the jury to acquit the prisoner. But later authorities have established the rule, that so much of the confession as relates strictly to the fact discovered by it, may be given in evidence. For, the reason of rejecting extorted confessions is the apprehension that the prisoner may have been induced, by the promise of clemency, to say what is false; but the fact discovered shows that so much of the confession as immediately relates to it is true. (*Rex v. Batcher*, 1 Leach, 265; note to *Rex v. Warrickshall*, 1 Id., 263.)

In the case before us, the prisoner told the policeman (the witness) where the watch was, under promise that the latter would get him out of the difficulty; this must have been so, as, in consequence of what he said, the witness went to the

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pawn office and got the watch, and the watch was identified at the trial by the owner, as the one taken from him. I take no account of the fact that the witness did not testify, in express terms, that the prisoner told him where the watch was; the confession is plainly inferable, for, as we have seen, he went to the pawn office in consequence of what the prisoner had said about the watch.

But if this made any difference, and if the confession was expressly testified to, it would have been admissible under the rule now established; for it would have related strictly to the fact discovered. The objection is, therefore, untenable.

II. It is objected that the court erred in charging the jury, that if they believed the witnesses for the prosecution, it would be their duty to render a verdict either of robbery or of larceny from the person, or of grand or petit larceny. The case of *The People v. Pomer* (4 Park. Cr. R., 558) is quoted to sustain this objection. But this, and the other cases to which reference is made, involved circumstantial as well as positive evidence; it, therefore, clearly rested with the jury in those cases to construe the circumstances; and the verdict did not depend exclusively upon the veracity of the witnesses, but also upon the effect which the jury would give to these circumstances. In the case under consideration, the proof was altogether positive; circumstantial proof was nowhere adduced, and the result depended exclusively upon the veracity of the witnesses. The charge was, therefore, correct.

The judgment should be affirmed.

Judgment affirmed.

SUPREME COURT. New York General Term, May, 1862. *Ingraham, Leonard and Rosekrans*, Justices.

JOHN J. HAYES, plaintiff in error, v. THE PEOPLE, defendants in error.

Form of an indictment for bigamy.

Under an indictment for bigamy, strict proof of marriage is necessary. It cannot be established by inference, or cohabitation, or admissions only.

Marriage is merely a civil contract, and may be entered into in any manner which clearly evinces the intention of the parties.

Where, on the trial of an indictment for bigamy, it appeared that the prisoner, who had been previously married, and whose wife was still living, agreed to marry J. W., and procured a person dressed as a clergyman to perform the marriage ceremony, at which J. W. agreed to take the prisoner for her husband, and the prisoner agreed to take J. W. for his wife, and the person officiating pronounced them man and wife, and they afterwards cohabited together as such, it was held that the prisoner was guilty of bigamy, whether the person officiating as a clergyman was in fact what he was represented to be, or was procured to personate a clergyman for the purpose of deceiving J. W. on that occasion.

AN indictment for bigamy was found against the prisoner, in the following form:

City and County of New York, ss:

The jurors of the People of the State of New York, in and for the body of the city and county of New York, upon their oath, present: That John J. Hayes, late of the first ward of the city of New York, in the county of New York, aforesaid, on the third day of February, in the year of our Lord one thousand eight hundred and forty-five, did marry one Sarah E. Blair, and her, the said Sarah E. Blair, did then and there have for his wife, and that the said John J. Hayes afterward, to wit, on the thirteenth day of September, in the year of our Lord one thousand eight hundred and sixty, at the ward, city and county aforesaid, while he was married to the said Sarah, with force and arms, did feloniously marry and take as his wife one Jane White, and to the said Jane White was then and there married, the said Sarah E. Blair being then and

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there living and in full life, against the form of the statute in such case made and provided, and against the peace of the People of the State of New York and their dignity.

NELSON J. WATERBURY, *District Attorney.*

The prisoner pleaded not guilty, and the issue came on to be tried before HOFFMAN, Recorder, and a jury, at a Court of General Sessions in the city of New York, in September, 1861.

It was proved on the trial, and also admitted by the prisoner, that he was married to Sarah E. Blair, at the parsonage of St. James' Church, Brooklyn, in February, 1845, by the Rev. Charles Smith, of the Catholic Church, and that the parties so married lived together as husband and wife till May, 1859, and that said Sarah E. Hayes (formerly Miss Blair) was still living, and was then in court.

Jane White then testified that she became acquainted with the prisoner in May, 1860, and received several visits from him; that she afterwards, at his request, engaged to marry him; that he hired rooms in Thompson street, near Grand street, in the city of New York, and they went there to live; that he brought in a minister, and they were married in those rooms on the 13th day of September, 1860; that the prisoner told her she must keep the marriage secret, as there was some property coming to him; that he said his mother died in March and left some property, and if the marriage was known he would lose the property; that he showed her the papers, and said there was one house in Myrtle avenue and two in Fulton street, and that she promised to keep the marriage secret till he got the property, and that she had done so; that she had no intimation before her marriage that he was a married man.

The witness further stated that after her marriage to the prisoner, they lived together as man and wife; that she did not know the person who performed the marriage ceremony; that the prisoner told her it was a minister he got, who would not reveal the secret; that it was the Protestant marriage cere-

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mony; that no one was present except the prisoner, herself and the clergyman; that she did not know the name of the clergyman, nor where he lived, and had never seen him since he gave her a certificate; that the defendant took the certificate, and she did not know where it was; that the last she saw of it, it was in her trunk in a small box.

On her *cross-examination*, she stated that she first saw the minister in the room; that the prisoner went down, was gone ten minutes, and then came back with the minister; he was dressed like a minister; had on a white necktie; that she did not ask his name; that she could not describe the ceremony; that he took a small book from his pocket, and read the Episcopal form, and asked her if she would take the prisoner for her husband, and she said yes, and he then asked the prisoner if he would have her for his wife, and he said yes, and then declared them man and wife; that she did not think it was necessary to have a witness; that she got the certificate that night; that the heading was printed, and the rest was then filled in by the minister; that the witness cannot read or write; that she had since tried to find the minister, and could not.

Other witnesses were examined on both sides.

After the testimony was closed, and the several counsel had addressed the jury,

The court charged the jury, amongst other things, that marriage in this State is a civil contract and did not require the intervention of minister or magistrate to make it legal; that any present agreement between the parties competent to contract to take each other for husband and wife, is a valid marriage.

That if the jury believed, upon the evidence, that the defendant and Jane White, on the day testified to by her, in the presence of the man represented to be a minister, agreed together to be man and wife, and afterwards lived together as such, the agreement was, in the eye of the law, a sufficient marriage to sustain an indictment for bigamy, the fact that defendant had before that time married Sarah E. Blair, and that she was then living, being admitted; and it was of no

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consequence whether the man represented to be a minister was such or not.

To each part of the charge, as above set forth, the defendant's counsel excepted, and requested the court to charge as follows, to wit:

That Hayes was not competent to contract marriage with any person on the 13th day of September, 1860, and a mere agreement on his part on that day to take a woman for his wife, she consenting to take him for her husband, does not constitute a marriage, and a prosecution for bigamy cannot be sustained therefor.

But the court refused so to charge, otherwise than above stated, and to the ruling and refusal the prisoner's counsel excepted.

The jury found the prisoner guilty, and the court sentenced him to imprisonment in State prison at Sing Sing for the term of three years.

The record was removed into this court by writ of error.

James T. Brady, for the plaintiff in error, cited 3 *Greenl. Ev.*, § 205; *Parsons on Contracts*, 899.

Nelson J. Waterbury (District Attorney), for the defendants in error, cited 1 *Hill*, 270; *Fenton v. Reed*, 4 *Johns. R.*, 52; 8 *Paige R.*, 574; 2 *Clinton's Dig.*, 929, "Marriage;" *State v. Rood*, 12 *Verm. R.*, 396.

By the Court, LEONARD, J. Under an indictment for bigamy, strict proof of marriage is necessary. It cannot be established by inference, nor by cohabitation or admissions only. The defendant is never estopped from denying the fact in a criminal case. His conduct may, however, be so wicked as to exclude favorable presumptions in his behalf. In the present case, it was proved that the prisoner introduced to the complainant a person whom he represented to be a minister, and who conducted a marriage ceremony between them as a minister, taking a small book from his pocket and reading the Episcopal form. This person was dressed to represent the

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character in which he served ; and it was manifest that it was designed by the prisoner that the complainant should believe him to be an ordained minister of the gospel. There was no proof, however, that he was, in fact, a clergyman, or authorized by law to certify a marriage for the purpose of registry. He asked the complainant if she would take the prisoner for her husband, and she answered, yes. The prisoner was asked if he would take the complainant as his wife, and he answered, yes. And the person officiating pronounced them man and wife. Here was every element necessary to constitute the contract of marriage. It was followed by cohabitation. The jury believed it was a reality to the complainant, whatever the prisoner intended. He may have procured some person falsely to represent himself as a minister, with the intent to deceive his victim, and to attain the object of his lust without any marriage.

Such a thing is possible. I see no reason, however, to presume that the prisoner committed another and different crime, in order to acquit him of the one with which he stands convicted here. Marriage, although the most solemn of obligations, is a civil contract, and may be entered into in any manner which clearly evinces the intention of the parties. It is altogether suitable that it should be celebrated in a manner to impress upon the parties and friends its sacred character. The law, as written in the statute, has wisely, I think, omitted to prescribe any form to be observed in entering into this contract.

I think the charge of the recorder was correct. The judgment should be affirmed.

SUPREME COURT. New York General Term, May, 1862.
Ingraham, Leonard and Rosekrans, Justices.

JOSEPH COHEN, plaintiff in error, *v.* THE PEOPLE, defendants
in error.

To convict of having feloniously received goods which had been stolen from an incorporated company, it is necessary to allege in the indictment, and to prove on the trial, that the company alleged to have been injured by the offense of the defendant was an existing corporation.

THE prisoner was indicted for feloniously receiving stolen goods. The indictment was as follows:

City and county of New York, ss:

The jurors of the People of the State of New York, in and for the body of the city and county of New York, upon their oath present:

That Joseph Cohen, late of the first ward of the city of New York, in the county of New York aforesaid, on the sixth day of May, in the year of our Lord one thousand eight hundred and sixty-one, with force and arms, at the ward, city and county aforesaid, twelve hundred spools of cotton thread, of the value of five cents each spool, of the goods, chattels and personal property of Grover & Baker's Sewing Machine Company, a corporation created by and existing under the laws of the State of Massachusetts, by Frank J. Thornton and certain other persons to the jurors aforesaid unknown, then lately before feloniously stolen of the said Grover & Baker's Sewing Machine Company, unlawfully, unjustly, and for the sake of wicked gain, did feloniously receive and have (the said Joseph Cohen then and there well knowing the said goods, chattels and personal property to have been feloniously stolen), against the form of the statute in such case made and provided, and against the peace of the People of the State of New York and their dignity.

NELSON J. WATERBURY, *District Attorney.*

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A plea of "not guilty" was interposed, and the indictment came on to be tried in said court, before JOHN T. HOFFMAN, recorder, and a jury, in the County General Sessions, held in the city of New York, in June, 1861.

The district attorney, to sustain the said indictment, called

James P. Denny, who, being sworn, testified as follows: I was in the employ of the Grover & Baker Sewing Machine Company, of No. 495 Broadway; I had general charge of the business; Frank J. Thornton was the shipping clerk; his business was to take charge of the shipping of machines and silk and cotton thread; previous to the 8th of May, property to the amount of \$1,200 was taken; I made inquiries at the store; in consequence of what I heard, I set Mr. Shaughnessey to watch Thornton; after we found he was taking goods, officer Wilson and another were set to watch him at the front and back doors of the store; Wilson shortly after reported to me, and the next day he arrested Thornton; in consequence of something I heard from Thornton or the detective, I had Cohen arrested; the silk taken from us was marked "Grover & Baker," by label put on by the manufacturers; the cotton taken was manufactured by Orr & Nott, Glasgow, and sold in this city by Knox, in Pine street; it was principally used for sewing machines, and worth forty-five cents a dozen spools; I cannot say that the box of cotton, said to have been taken from the prisoner by officer Wilson, was ours; it was precisely like it; the company is located at Boston, Massachusetts.

On being *cross-examined*, the witness said: It had the same manufacturer's mark as ours, but others sell that cotton as well as we.

Nicholas Shaughnessey was next sworn, and testified as follows: I was in the employ of the Grover & Baker Sewing Machine Company, in May last; so was Frank Thornton; his usual time to come was about half-past seven; I have seen him come about seven and go away again, and return about eight; I was directed to watch him, and did; Monday morning, about twenty minutes to seven, I saw him take a box of silk, in the absence of the porter from that part of the store,

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and put it in his pocket, or inside his vest, and go with it through the back door out of the store; on the next day I saw him take another box of silk, and on the day following he took a box of cotton; he said he was going to ship it to Ohio; he was soon afterwards arrested; I had before seen him take packages; the box he took on Wednesday had no shipping mark on, nor had the others he took, that I know of; on Tuesday morning I did not follow him; on Wednesday morning I saw him go into the Mercer House, and lost sight of him; he always said he was going to ship them; I cannot say if he shipped them or not.

Frank J. Thornton was then placed on the stand and sworn. He testified as follows: I was in the employ of the Grover & Baker Sewing Machine Company, in May last, and had been so for about one year; I first saw Joseph Cohen, the prisoner, at the Melodeon, in Broadway; he was keeping a small stand there; he afterwards came to me and asked me if I wanted to make \$500; I asked him how; he told me to call at his house the following morning; I did call at 88 White street; he said that Grover & Baker had a large quantity of silk and cotton, and if I would bring him cotton and silk, I could have money at command at any time; he told me he had been in the habit of buying the Grover & Baker silk and cotton for some time, at low prices; he showed me Grover & Baker's silk, Wheeler & Wilson's silk, and Mr. Singer's silk; he told me that I need not be afraid to bring things there; on the following morning I took some sewing silk and carried to his house; I took the labels off; it was in a small box; I destroyed the box and tore the labels off; I hesitated to carry it in the street with the name on; it did not suit him in that state; he said he could buy all he wanted elsewhere, and if I did not bring it with the labels on, he did not want it; he went to Turner's silk house and bought a bill of silk, but not in his own name; during the time I was there, I met five persons; two of them were victims, like myself; three of them, he told me, I need not be afraid of, as they were as large receivers as he was; one he warned me against, as he might interfere with

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the business; I took boxes of cotton and bundles of silk, all from the Grover & Baker Sewing Machine Company; I can't tell how much; I went to Cohen's house two or three times a week; the price paid for cotton was \$12 per box of 100 dozen; for silk he gave me \$8 per box; I generally took them there about seven or eight o'clock in the morning.

Cross-examined: Have lived in New York nine years; came from Rhode Island; I have been a collector, a grocery store keeper, and also a dry and fancy goods dealer in Broadway; I am married, and have been for the past eighteen months; I am indicted for the stealing of these goods; my salary was \$10 per week; I don't know the effect of being made a witness; I know that, in certain cases, prisoners being used as witnesses are discharged; a clerk in the district attorney's office told me that I would go to the State prison whether I was a witness or not; I asked the keepers of the prison what they thought, but could get no satisfactory information; I made a full written confession, and gave it to my wife to give to Mr. Garvin, the district attorney; I recollect taking a box, which I said I was going to ship to Ohio; that was the morning I was arrested; I was arrested by Wilson; I knew him, and told him the whole story.

William Wilson was next sworn for the People, and said: I am an officer; I was employed to watch Thornton, and did so; on the seventh of May I followed him to No. 86 White street; it was about seven o'clock A. M.; he seemed to have something heavy in his coat pocket when he went in; when he came out it appeared to be much lighter; on the morning of the eighth day of May, I saw him come out of his place of business with a box under his arm, go into the Mercer Street House and come out again, when I arrested him; on the afternoon of the same day I arrested Cohen, the prisoner, in Broadway, with a box of spool cotton under his arm; he said there were twelve dozen in the box; I saw him come out of his house with it; I afterward took him to the station house, and then searched his house, but found nothing.

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On the part of the defense,

Henry Turner was called, and testified as follows: I am a silk manufacturer and seller in this city; I sell a large quantity of silk to the Grover & Baker Company, and I also sell to others; I have sold silk to the prisoner; about \$100 worth, perhaps; the three bills shown are from my store; one of them is in my handwriting, and the others my clerks'; I remember selling him silk; can't say when was the last time; whether it was April or May last, or not; it is worth \$7 per pound; that is the price I sell to Grover & Baker for, and I sold to the prisoner for the same.

Previous to going into the defense, prisoner's counsel asked the court to direct an acquittal, upon the ground that there was no evidence showing that the Grover & Baker Sewing Machine Company was a corporation, as alleged in the indictment, which the court refused to do, and to which refusal the prisoner's counsel excepted.

The prisoner was convicted and a writ of error was issued, under which the record was removed into this court for review.

S. H. Stuart, for the plaintiff in error.

It is submitted that the verdict must be reversed, because there is no evidence that the "Grover & Baker Sewing Machine Company" is a corporation, as averred in the indictment.

It is a rule of the first importance that the name of the party injured, or to whom stolen property belongs, should be correctly stated, and that the proof support the statement. (1 *Archb. Cr. Pl.*, 18th ed., 176.)

If the goods of a corporation be stolen, the property must be charged to be in the corporation, and not in the individuals who compose it. It may not, in all cases, be necessary to aver the political existence of the corporation; but even where it is not averred, its existence as such must, nevertheless, be shown by evidence. (*King v. Potnell*, 2 *East P. C.*, 1059; 1 *Leach R.*, 128; *Arch. Cr. Pl.*, 10th ed., 214.)

This same doctrine is enunciated in *People v. Stearns* (25 Wend. R.) One of the objections of the prisoner in that case was, that the Bank of Kentucky was not averred in the indictment to be a corporation, and that, therefore, no evidence could be given showing it to be so. The court held, that although there was no special averment that the bank was incorporated, but being necessary to show that it was a corporation, the charter or act of incorporation could be given in evidence, which was done. The point of the exception was, not that no evidence had been given tending to prove it a corporation, but that, without an express averment, evidence had been given showing it to be incorporated.

In the case at bar, both from legal necessity and by reason of the averment in the indictment, it became incumbent to prove that this "Sewing Machine Company" was a corporation, and the objection is, that it was not done; that no evidence whatever was given tending to prove it to be so. The averment is, that the company was a corporation, existing in and under the laws of the State of Massachusetts, while not one fact was proved, nor one word of testimony given, going in any degree to show that the company had a corporate existence.

The case of *Stearns* (25 Wend. R., 409); of *Peabody* (21 Wend. R., 472); of *Chadwick* (2 Park. Cr. R., 163); of *Wilber* (4 Park. Cr. R., 19); of *De Bow* (1 Denio R., 9); of *Mead* (27 Vermont, 277), with authorities cited in those cases, show conclusively that where a corporation is the subject of a direct criminal injury, its existence must be affirmatively shown by evidence. Whether an omission to aver the existence of a corporation relieves (it does not) the prosecution from proving it, need not be now considered, since it is here specially and with much particularity averred that this company is incorporated. Unless, then, the averment of its being a corporation can be rejected as surplusage, or be in some way disregarded, the verdict must be set aside. That this averment cannot be disregarded, is manifest from the following authorities:

The court cannot reject as surplusage that upon which the

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jury may have given their verdict. (*Commonwealth v. Atwood*, 11 *Mass. R.*, 11.)

No allegation, whether it be necessary or not, which is, in fact or by the pleadings, made material, can be rejected as surplusage. (*United States v. Howard*, 3 *Sumn.*, 12.)

Surplusage in an indictment consists of such matter only as is in no way essential to the description or identity of the offense charged, and that does not contradict that which is. (6 *Phil. L. R.*, 98.)

If an indictment allege matters descriptive, however unnecessary to the charge, they become as much the subject of proof as those that are essential to the crime preferred. (*United States v. Porter*, 3 *Day*, 283.)

Averments that might with propriety be dispensed with, but being inserted become descriptive of that which is essential, cannot be rejected as surplusage. (*John v. The State*, 24 *Miss. R.*, 569; *State v. Clark*, 3 *Foster R.*, 429; *State v. Hughes*, 1 *Swan R.*, 262; *State v. Copp*, 15 *N. H. R.*, 212; *State v. Shoemaker*, 7 *Mo. R.*, 177; *Morrison v. State*, 24 *Miss. R.*, 86.)

But dismissing (for the argument) the necessity of showing by evidence that this company is a corporation, and regarding it as a non-incorporated company, still this indictment cannot be sustained. Nothing is better settled at common law than that where the owners of stolen property form an unincorporated company or copartnership, the names of all the members comprising the association must be correctly stated, and the property laid to be in them as individual persons. (*Whar. Cr. L.*, 465; *Hogg v. State*, 3 *Blackf.*, 826; *Rex v. Shovington*, 1 *Leach R.*, 518; *Rex v. Bensall*, 1 *Moody C. C.*, 15.)

The only innovation our statute has made upon this rule, is the following section :

"When any offense shall have been committed upon or in relation to any personal property belonging to several partners or owners, the indictment for such offense shall be deemed sufficient if it allege such property to belong to any one or more of such partners or owners, without naming them all." (3 *R. S.*, 5th ed., p. 1018.)

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Rejecting the averment that this company is a corporation, and we have "the Grover & Baker Sewing Machine Company," without any member, partner, officer or agent, or any president or director named or described as comprising or representing it, in whom the property mentioned might be supposed to vest. It will not be contended that the property can be laid as the goods of the "company" merely, without specifying some one—some private individual or official person of the company, in whom the title to the property may be taken to rest. In a company or copartnership, or the like, this must be done; in a corporation it cannot be done. The proof is as much wanting, in this view of the case, as it is having reference to the existence of a corporation. It is hard to see how, in either aspect, this verdict can possibly be sustained.

J. H. Anthon, for defendants in error.

By the Court, LEONARD, J. It was necessary to allege in the indictment, and also to prove at the trial, that the corporation alleged to have been injured by the offense of the defendant, was an existing corporation. The evidence wholly fails in this respect. There must be a new trial in the Sessions.

Judgment reversed, and new trial in the Sessions ordered.

SUPREME COURT. New York General Term, May, 1862.

Ingraham, Leonard and Barnard, Justices.

GEORGE F. CLEMENTS, plaintiff in error, *v.* THE PEOPLE,
defendants in error.

Form of an indictment for forgery, in the third degree, in forging and uttering a bank check.

An indictment which charges the uttering of a forged bank check will not be sustained by proof on the trial of the uttering of a check, on the face of which was a forged certificate, purporting to be signed by an officer of the bank on

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which the check was drawn, though the check with the certificate on its face be set forth, *in hac verba*, in the indictment.

The words, "certified by Sparks, Bank J. C.," written on the face of a check drawn on the Bank of Jersey City, constitute no part of the check, and proof of the forgery of such a certificate will not support a charge of forging the check.

THIS case came before the court on a writ of error. By the return, it appeared that an indictment in the following form, was found in the New York General Sessions, against the plaintiff in error:

"*City and County of New York, ss:*

The jurors of the People of the State of New York, in and for the body of the city and county of New York, upon their oath present: That George B. Clements, late of the first ward of the city of New York, in the county of New York aforesaid, on the 8d day of September, in the year of our Lord one thousand eight hundred and sixty-one, with force and arms, at the ward, city and county of New York, aforesaid, feloniously did falsely make, forge and counterfeit, and cause and procure to be falsely made, forged and counterfeited, and willingly aid and assist in the false making, forging and counterfeiting, a certain instrument and writing, commonly called a bank check, which said false, forged and counterfeited instrument and writing, is as follows, that is to say:

"No. 492.

Jersey City, Sept. 3, 1861.

THE BANK OF JERSEY CITY,

Pay to the order of Livermore, Olives & Mason, Twenty-four hundred, sixty-six dollars ninety-three cents.

M. BARKER & SON.

Certified by SPARKS, BANK J. C.

\$2,466.93."

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With intent to injure and defraud Charles F. Livermore, Henry Clews and Henry M. Mason, and divers other persons to the jurors aforesaid unknown, against the form of the statute in such case made and provided, and against the peace of the People of the State of New York and their dignity.¹

And the jurors aforesaid, upon their oath aforesaid, do further present: That the said George B. Clements, late of the ward, city and county aforesaid, afterward, to wit, on the day and year last aforesaid, with force and arms, at the ward, city and county aforesaid, feloniously and falsely did utter and publish as true, with intent to injure and defraud the said Charles F. Livermore, Henry Clews and Henry M. Mason, and divers other persons to the jurors aforesaid unknown, a certain false, forged and counterfeited instrument in writing, commonly called a bank check, which said last mentioned false, forged and counterfeited instrument and writing is as follows, that is to say:

"No. 492.

Jersey City, Sept. 3, 1861.

THE BANK OF JERSEY CITY,

Pay to the order of Livermore, Clews & Mason, Twenty-four hundred sixty-six dollars ninety-three cents.

M. BARKER & SON.

Certified by SPARKS, BANK J. C.

\$2,466.93."

The said George B. Clements, at the said time he so uttered and published the last mentioned false, forged and counterfeited instrument and writing² as aforesaid, then and there well knowing the same to be false, forged and counterfeited, against the form of the statute in such case made and provided, and against the peace of the People of the State of New York and their dignity.

NELSON J. WATERBURY, *District Attorney.*"

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The defendant having been arraigned upon said indictment, pleaded not guilty, and the trial thereon was had before JOHN T. HOFFMAN, Recorder of the city of New York, and a jury, at a Court of General Sessions in the city of New York, on the ninth day of October, 1861.

The prosecution called as a witness,

William B. Bend, who testified: I am in the employ of Livermore, Clews & Mason, and was September 2, 1861, as clerk; saw prisoner at their store, first time, September 2; he presented a letter now shown; don't recollect that he said anything; Clews opened it; marked at the foot the price at which the notes would be supplied, and handed it to me; I made out statement at that price, and handed it to the prisoner; I saw it the following day; he took it and asked when he could have the notes; he came on the 3d, in the morning, and presented second letter; it inclosed a check which is attached to complaint; I saw it was for amount of statement, and appeared to be certified; I handed him the five treasury notes of \$500 each, and he left the store in a few minutes; next saw him in station house; he was arrested on complaint of the house.

(Check here read in evidence.)

Cross-examined: First letter was in envelope fastened with gum; Clews broke it open and read it; don't recollect he said he was requested to get the information; he did say, "when can I get the notes?" don't recollect he said any one told him to ask; the second note was sealed; no conversation at that time.

S. Hatch, sworn for prosecution: I am cashier of "Bank of Jersey City," and I sometimes certify checks; when I don't, teller does; teller's name is Post; he has been in the bank four or five years, and still is; no clerk or teller by name of Sparks; this certificate is not the certificate of the bank, or any one authorized to certify by the bank; we have an oval stamp certified payable at Ocean Bank for checks to be used in New York, and name written under note of Hatch or Post; checks used in Jersey City we merely write "Good, Post," or

"Good, Hatch;" no other bank of Jersey City; no such person as Sparks in our bank.

The testimony having been closed, and no evidence having been offered by defendant, the case was summed up.

The recorder charged the jury substantially to the effect, that if they were satisfied from the evidence that the certificate on the check was a forgery, and that the defendant uttered said check with the forged certificate thereon, knowing the same to be forged, and with the intent to defraud, it would be the duty of the jury to convict. To which the counsel for the prisoner excepted.

The counsel for the prisoner requested the court to charge as follows:

First. In order to sustain the indictment, the prosecution is bound to prove that the signature of M. Barker & Son is a forgery. No such evidence has been adduced.

The court refused so to charge. To which refusal the counsel for the prisoner excepted.

Second. The indictment does not charge that the alleged forged instrument is "an order for the payment of money, or an instrument by which any pecuniary demand is created," which averment is essential.

The court refused so to charge. To which refusal the counsel for the prisoner excepted.

Third. The indictment does not charge the forgery of the certificate, which is no part of the check, and is not essential to its validity, and creates no demand or obligation for the payment of money, and the prisoner cannot be convicted under this indictment, which charges only the forgery of the check.

The court refused so to charge. To which refusal the counsel for the prisoner excepted.

Fourth. If the firm of M. Barker & Son had no account in the Bank of Jersey City, and the prisoner, knowing the fact, fraudulently obtained the treasury notes from Livermore, Clews & Mason, he is guilty of obtaining money by a false token, and cannot be convicted under this indictment.

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The court charged that the first part of this proposition was correct, but refused to charge as requested in the latter portion thereof. To which refusal the counsel for the prisoner excepted.

The jury found the prisoner guilty. The prisoner was sentenced to the State prison for the term of four years.

Jonas B. Phillips, for plaintiff in error.

1. The court erred in refusing to charge that in order to sustain the indictment, the prosecution was bound to prove that the signature of M. Barker & Son to the check was a forgery.

It is an established rule that the evidence offered must correspond with the allegations in the indictment, supposing the allegations to be material and necessary.

The indictment in this case alleged *the forgery of the check*. No evidence having been introduced to sustain such allegation, which *was material and necessary*, the court manifestly erred in refusing to charge as above requested. (1 *Greenleaf on Ev.*, § 51; *Best's Principles of Ev.*, §§ 22-249.)

2. The court erred in refusing to charge that the indictment does not charge that the alleged forged instrument "is an order for the payment of money, or an instrument by which any pecuniary demand is created."

The prosecution having only offered evidence to show the certificate to be a forgery, such averment became essential, as the certificate, upon its face, creates no demand or obligation for the payment of money.

The indictment must show the forgery of an instrument which, on being described, appears, on its face, naturally calculated to work some effect on property; or, if it be not complete for that purpose, some extrinsic matter must be shown whereby the court may judicially see its tendency. (2 *Archb. Crim. Pl.*, *Waterman's Notes*, 7th ed., 808.)

3. The court also erred in refusing to charge as requested in the third proposition. The certificate is no part of the check, and is not essential to its validity.

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The forgery of a mere addition to the instrument, which has not the effect of altering it, but is merely collateral to it—as, for instance, a forged indorsement, or acceptance to a genuine bill of exchange—will not support an indictment for the forgery of the entire instrument. The forgery of such addition must be specially alleged and proved as laid. (*Whart. Am. Cr. L.*, ed. of 1846, 336.)

4. The court erred in refusing to charge that the defendant could not be convicted under this indictment, if the firm of M. Barker & Son had no account in the Bank of Jersey City, and the prisoner, knowing the fact, fraudulently obtained the treasury notes from Livermore, Clews & Mason, in which case he would have been guilty of obtaining money by a false token, and not guilty of forgery.

5. The alleged forged certificate in no respect resembled a genuine certificate of the teller or cashier of the Bank of Jersey City. The instrument must appear, upon the face of it, to have been made to resemble a true instrument of the description named in the indictment. (*United States v. Morrow*, 4 *Wash. C. C. R.*, 738; 4 *Taunt.*, 300; *Russ. & Ry.*, 212-219.)

6. The conviction under this indictment could not be pleaded in bar to an indictment for forging the certificate.

John H. Anthon, for defendants in error.

I. The name given to an instrument, by way of description, is not to be regarded when the instrument is set forth at length in the indictment. (*Whart. Cr. L.*, ed. of 1851, §§ 350-1467.)

II. The words "certified by Sparks, Bank J. C.," having been set forth *in hæc verba* in the indictment, and having been alleged a forged instrument, the proof of its forgery sustains the verdict, and it is immaterial that the other portions of the instrument, or another instrument, was also set forth in the indictment, they being necessary, and only necessary, to explain the forged clause.

A bond is alleged in an indictment as forged. The proof shows the name of another obligor added. The rule here is

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that the forgery may be charged, and be supported by evidence of the alteration. (*State v. Gardiner*, 1 *Iredell R.*, 27.)

It is a variance to allege the forgery by a name other than its true name, when the statute affixes a penalty to forgery of the instrument alleged, different from the penalty affixed to the forgery of the true instrument. (2 *Archb. Cr. Ev.*, 7th ed., 807.)

Otherwise, however, when the penalty is the same.

III. In the manner and form, as the instrument was uttered, so it was pleaded in the indictment. The negotiable market value of the instrument consisted in its being a *certified* check. The prosecutor was deceived by it as a certified check. The evidence showed that the instrument was not a certified check, but had been made to appear so by a forgery of the certificate clause.

IV. Considering the instrument as a whole, no proof having offered as to the goodness of any part, and one part having been proven forged, the whole becomes a forged instrument, and the count in the indictment for uttering it was proven and the verdict justly rendered.

1. The particular part of the instrument forged need not be pointed out on the face of the indictment, and is rarely done so.

2. But few forged instruments are all forgeries. They may be forged by additions, by alterations, by erasures, by annexations.

V. There being no exception to evidence, the only question, on appeal can be, is the indictment sufficient to sustain the verdict? The verdict finds the certificate a forgery, and uttered by the prisoner.

VI. The English decisions to the contrary (*Rex v. Howell*, 6 *Carr. & Payne*, 148; *Butterwich's Case*, *Roscoe's Cr. Ev.*, 485; 2 *Arch. Cr. Pr.*, 808, notes) are all based upon the English statute of 1 William IV, ch. 66, § 4; which statute provides in terms for the forgery of a draft with a penalty, and also in terms for the forgery of an acceptance.

In *Rex v. Howell*, the court uses the following words: "The

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statute has made a distinction between bill and acceptance, for it uses both terms. If proof of forging an acceptance will support a count for forging a bill, the word 'acceptance' in the statute is wholly nugatory."

The statute of the State makes no such distinction, but defines the crime by a word applicable to check, certificate, draft, acceptance, or any of them: "Every person who, with intent to injure or defraud, shall make, alter, forge, or counterfeit any instrument or writing, being, or purporting to be, the act of another, by which any pecuniary demand or obligation shall be, or shall purport to be created, increased, discharged, or diminished," etc. (3 R. S., 5th ed., p. 951, § 33.)

By the Court, INGRAHAM, P. J. The first count of the indictment charged the prisoner with having falsely made, forged and counterfeited a certain instrument in writing, commonly called a bank check, &c. The check was set out in the indictment in *hæc verba*, and upon the face of it were written the words and letters, "Certified by Sparks, Bank J. C." The second count charged the felonious and false uttering of the same check as a certain false, forged and counterfeited instrument and writing, commonly called a bank check, and also contained a copy of the check.

Upon the trial the only writing shown to be forged was the writing across the face of the check. The proof showed there was no such clerk as Sparks in the bank on which the check was drawn.

The counsel for the prisoner, among other requests, asked the court to instruct the jury that the indictment did not charge the forgery of the certificate, which was no part of the check, and not essential to its validity, and created no demand or obligation for the payment of the money, and the prisoner could not be convicted under the indictment which charged only the forgery of the check.

The prisoner was convicted.

Upon the argument, the counsel for the People conceded that the prisoner could not be convicted under the first count

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of the indictment which charged the forgery. Of this I think there can be no doubt. It will not be pretended that the words written across the face of the check were any part of the check, in any way necessary to give it validity or to add to its negotiability. They might have been given in a different form, and on a separate piece of paper, and would have left the check in its original form, valid and effectual for all the purposes for which it was made.

This writing can be considered as nothing more than a certificate that at its date the check would be paid by the bank on presentment.

The forgery of an acceptance on a bill of exchange is not properly described in an indictment which charges the forgery of the bill only.

The acceptance is no part of the bill of exchange. The bill is perfect without it. It can be protested, sued upon and collected, whether accepted in writing or not, and the forgery of the bill can be counted upon as an offense just as well, if not accepted, as if it had been previously accepted. This question has been the subject of direct adjudication in England, as applicable to a bill of exchange.

In *Ree v. Howell* (25 Com. Law R., 386; and 6 Car. & Payne, 148), it was held that a count in an indictment, charging the uttering of a forged bill, was not supported by proof that the prisoner uttered the bill and that the acceptance was a forgery.

In this case, the question was reserved for all the judges, who agreed that the conviction for uttering the instrument was wrong, and could not be sustained. The whole theory of the criminal law renders the enforcement of such a rule necessary. In no pleading are so much certainty and particularity required as in an indictment. "That certainty and precision (said EDMONDS, P. J., in *Briggs v. The People*, 8 Barb. R., 547) in an indictment is required, which will enable the defendant to judge whether the facts and circumstances stated constitute an indictable offense; that he may know the nature of the offense against which he is to prepare his

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defense; that he may plead a conviction or acquittal in bar of another indictment, and that there may be no doubt as to the nature of the judgment to be given in case of conviction."

It does not help the case to say that the indictment sets out the instrument in *hæc verba*, and therefore the prisoner was informed what the instrument was on which the prosecution rested. Suppose, in this case, the prisoner had uttered the check, not knowing of the forgery, or if the writing of the acceptance was a doubtful question, admitting of different opinions whether it was genuine or not, would a prisoner, under such an indictment, be led to prepare proof of the acceptance, or would he not rather confine his preparation to proof of the genuineness of the signature of the drawer? And when told on the trial the forgery is in the acceptance, he may well reply, no such charge is made against me, and I am not prepared to meet it.

I can see no ground for any distinction between forging the instrument and uttering the instrument knowing it to be forged. In both cases the prisoner is entitled to be told what his offense is, in such a manner that he may be prepared to meet the charge, and so clearly that, if once tried and disposed of, the decision may be pleaded in bar of any other indictment. That could not be the case under the present indictment.

It is suggested that the decisions in England are based upon the statute, which distinguishes between a draft and an acceptance. Our statute distinguishes quite as much. It does not specify an acceptance in any case, but after enumerating the terms of the offense, "falsely making, uttering, forging or counterfeiting," applies it to any instrument or writing purporting to be the act of another, by which any pecuniary demand or obligation shall be or purport to be created, &c. Here the check is the act of one party. The acceptance or certificate is the act of another party, each creating different obligations, and each valid in itself, and constituting a separate instrument. (3 R. S., 5th ed., p. 951, § 33.)

The judgment should be reversed, and a new trial ordered in the Sessions.

SUPREME COURT. New York General Term, May, 1862.

Ingraham, Leonard and Rosekrans, Justices.

CHARLES COBEL, plaintiff in error, *v.* THE PEOPLE, defendants in error.

Form of an indictment for manalaughter in the second degree in procuring an abortion, under the act of 1846, chapter 22, section 1.

An indictment for manalaughter in the second degree charged the killing of the quick child of M. A. B., by instruments used on her body, for the purpose of procuring an abortion. The jury found the prisoner not guilty of manalaughter in the second degree, but guilty of a misdemeanor in employing instruments and other means "upon the person of a pregnant woman, with intent thereby to procure the miscarriage of such woman." *Held*, that the verdict was defective in not finding that the offense was committed upon the person named in the indictment, and the judgment rendered thereon was, for that reason, reversed.

AN indictment was found against the prisoner, in the following form:

"City and County of New York, ss:

The jurors of the People of the State of New York in and for the body of the city and county of New York, upon their oath, present:

That Charles Cobel, late of the first ward of the city of New York, in the county of New York aforesaid, on the thirtieth day of September, in the year of our Lord one thousand eight hundred and sixty-one, at the ward, city and county aforesaid, with force and arms, in and upon one Mary Ann Baker, in the peace of the People of the State of New York then and there being; she, the said Mary Ann Baker, being then and there pregnant with a quick child, feloniously and willfully did make an assault; and that the said Charles Cobel then and there did willfully and feloniously use and employ on and upon the womb and body of the said Mary Ann Baker a certain instrument to the jurors aforesaid unknown, with intent thereby then and there feloniously to destroy the said quick child, the same not then and there being necessary to preserve the life of the said Mary Ann Baker, the mother of

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the said quick child, and not having then and there been advised by two physicians to be necessary for that purpose, by means whereof the death of the said quick child was thereby produced, against the form of the statute in such case made and provided, and against the peace of the People of the State of New York and their dignity.

And the jurors aforesaid, upon their oath aforesaid, do further present, that the said Charles Cobel, late of the ward, city and county aforesaid, afterwards, to wit, on the day and in the year aforesaid, at the ward, city and county aforesaid, with force and arms, in and upon the said Mary Ann Baker, then and there being, and being then and there pregnant with a quick child, feloniously and willfully did make another assault; and that the said Charles, a certain instrument, the name whereof is to the jurors aforesaid unknown, which he, the said Charles, in his right hand then and there had and held, into her, the said Mary Ann, and into and upon the womb of her, the said Mary Ann, did feloniously thrust, push and press, and did then and there willfully and feloniously use and employ the said instrument upon the said Mary Ann, in manner aforesaid, with intent feloniously to destroy the said quick child, the same not then and there being necessary to preserve the life of the said Mary Ann, the mother of said child, and not having been advised by two physicians to be necessary for that purpose, whereby, and by means whereof, the said child became and was then and there weak, debilitated, and mortally sick and distempered in body, of which said weakness, debilitation, mortal sickness and distemper, so occasioned as aforesaid, the said child then and there did die.

And so the jurors aforesaid, upon their oath aforesaid, do say, that the said Charles Cobel, the said child, in manner and form, and by the means aforesaid, on the day and in the year aforesaid, at the ward, city and county aforesaid, willfully and feloniously did kill and slay, against the form of the statute in such case made and provided, and against the peace of the People of the State of New York and their dignity.

NELSON J. WATERBURY, *District Attorney.*

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The prisoner pleaded "not guilty," and the issue was tried in the New York General Sessions, before JOHN H. McCUNN, city judge, in January, 1862.

The jury rendered the following verdict: "Not guilty of manslaughter in the second degree, but guilty of a misdemeanor, to wit, in the use and employment of instruments and other means upon the person of a pregnant woman, with intent thereby to procure the miscarriage of such woman."

A motion was made in arrest of judgment, which was denied, and the prisoner was sentenced to imprisonment in the penitentiary for the term of one year. A writ of error was then brought, removing the record to this court.

E. Blankeman, for the plaintiff in error.

S. B. Garvin, for the People.

By the Court, INGRAHAM, P. J. Without examining the question whether, under an indictment for using instruments upon a female with the intent to destroy a quick child, of which such female was pregnant, the prisoner could be convicted of a misdemeanor in using such instruments upon the same female with intent to procure a miscarriage, we are of the opinion that a conviction in this case cannot be sustained. The verdict of the jury was, "Not guilty of manslaughter in the second degree, but guilty of a misdemeanor, to wit, in the use and employment of instruments and *other means* upon the person of a pregnant woman, with intent thereby to procure the miscarriage of such woman." The indictment charged the commission of the offense to have been on Mary Ann Baker only. The finding should have been that such offense was committed upon her, or the indictment is not sustained. Finding the offense to have been committed upon a woman, who is not named, does not show that the offense charged has been proved.

We think the judgment was erroneous, and must be reversed, and a new trial ordered in the Sessions.

SUPREME COURT. New York General Term, May, 1862.
Ingraham, Leonard and Rosekrans, Justices.

THE PEOPLE v. MICHAEL COOK.

An accomplice is a competent witness for the prosecution on a criminal trial, and the jury may convict on the uncorroborated evidence of an accomplice, if they regard it sufficient to prove, beyond a reasonable doubt, the guilt of the accused.

On the trial of an indictment for receiving stolen goods, knowing them to have been stolen, the thief from whom the prisoner received the goods is not to be regarded as an accomplice, but as guilty of a previous and different offense.

THE prisoner was indicted for having feloniously received fifty yards of muslin, stolen by Robert Thompson from Thomas C. M. Paton, knowing the property to have been stolen.

A plea of not guilty was put in, and the issue was tried before McCUNN, city judge, at a Court of General Sessions held in the city of New York on the 27th November, 1861.

On the trial, the district attorney called *Robert Thompson* as a witness. It was admitted he was the same person who stole the goods from Paton.

The counsel for the prisoner objected to the witness being allowed to testify, on the grounds,

1. That no application had been made to the court to allow the witness to be examined, and that such application, showing the grounds upon which it was based, was a legal prerequisite to the examination of an accomplice, and that, before the court could exercise its discretion in admitting or rejecting the accomplice, this formal application must be made.

2. That in this case the accomplice was the principal offender, even on the theory that the accused was guilty of the offense imputed to him, and that it was the duty of the court, in the exercise of a sound discretion, and under the principles of law governing such discretion, to refuse to allow the thief to testify.

The court overruled the objections to the admissibility of the witness, and the defendant's counsel excepted.

The witness was then sworn, and gave material evidence in the case.

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After the evidence was closed, the recorder charged the jury, among other things, that, although the jury might convict a person upon the uncorroborated testimony of an accomplice, it was not a safe practice, and he should recommend the jury not to convict upon the uncorroborated testimony of Thompson.

The jury rendered a verdict of guilty; and the proceedings were removed by *certiorari* to this court for review.

Nelson J. Waterbury (District Attorney), for the People, cited *Archbold's Criminal Pleading*, 323; *King v. Haslem*, 1 *Leach*, 418.

Richard Busted, for the prisoner.

By the Court, *INGRAHAM*, P. J. The rule is too well settled, both in England and this country, to admit of any doubt of the right of the public prosecutor to use an accomplice as a witness. *Chitty* says, it was formerly held that though an accomplice may be admitted as a witness, his testimony could only be left to the jury when corroborated; but it is now settled that such evidence may be left to the jury, and if they regard it sufficient, the prisoner may be convicted. (1 *Chit. Cr. L.*, 604; 2 *Campb.*, 132; 7 *Term R.*, 609.)

So in this country it has been held, that new trials will be refused even when the verdict was obtained on such testimony uncorroborated. (1 *Denio*, 83; *Whart. Cr. L.*, 784.)

But in this case the witness was not an accomplice. He was guilty of another offense, committed previous to that of which the prisoner was convicted. Such an objection is never sufficient to prevent his examination, though it may affect his credibility. This was conceded by *DUER, J.*, in *The People v. Whipple* (9 *Cow.*, 707), relied on by the prisoner's counsel. Nor in such a case is any application necessary to the court, even if it be conceded that it would be proper in the case of an accomplice.

The conviction must be affirmed.

SUPREME COURT. New York General Term, September, 1862.

Ingraham; Barnard and Clerke, Justices.

CHARLES H. FLEMING, plaintiff in error, *v.* THE PEOPLE,
defendants in error.

On the trial of an indictment for bigamy, it is not necessary to prove that, at the time of the alleged second marriage, the defendant did not come within any of the exceptions mentioned in part 4, chapter 1, title 5, article 2, section 9 of the Revised Statutes.

An objection that an indictment for bigamy contains no averment that the prisoner does not come within the exceptions set forth in section 9 of the statute, if available at all, should be made before judgment. After judgment it is too late to raise the question.

The following indictment was presented against the prisoner:

City and County of New York, ss:

The jurors of the People of the State of New York, in and for the body of the city and county of New York, upon their oath present: That Charles H. Fleming, late of the first ward of the city of New York, in the county of New York aforesaid, on the eleventh day of November, in the year of our Lord one thousand eight hundred and fifty-five, did marry one Rowena Baldwin, and her, the said Rowena, did then and there have for wife; and the said Charles, afterwards, to wit, on the thirty-first day of December, in the year of our Lord one thousand eight hundred and sixty-one, at the ward, city and county aforesaid, with force and arms, did feloniously marry and take as his wife one Jane A. Butt, and to the said Jane was then and there married, the said Rowena being then and there living, and in full life, against the form of the statute in such case made and provided, and against the peace of the People of the State of New York and their dignity.

A. OAKLEY HALL, *District Attorney.*

A plea of "not guilty" was put in, and the issue was tried at a Court of General Sessions, held in the city of New York, on the 24th day of April, 1862, before HOFFMAN, recorder.

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Several witnesses were examined, and different questions of law were raised on the trial.

The counsel for the prisoner, among other things, requested the court to charge, that in order to justify a conviction it was necessary to prove that, at the time of the alleged marriage between the defendant and Jane A. Butt, the defendant did not come within any of the exceptions mentioned in part 4, chapter 1, title 5, article 2, section 9 of the Revised Statutes. The court refused so to charge, and the prisoner's counsel excepted.

The jury found the prisoner guilty, and a writ of error was sued out, under which the record was removed into this court.

Henry L. Clinton, for the prisoner, made the following points:

The sections of the statute applicable to this case are as follows:

§ 8. "Every person having a husband or wife living, who shall marry any other person, whether married or single, shall, *except in the cases specified in the next section*, be adjudged guilty of bigamy, and upon conviction shall be punished by imprisonment in a State prison for a term not exceeding five years."

§ 9. "The last section shall not extend to the following persons or cases:

1. "To any person, by reason of any former marriage, whose husband or wife by such marriage shall have been absent for five successive years, without being known to such person within that time to be living; nor

2. "To any person, by reason of any former marriage, whose husband or wife by such marriage shall have absented himself or herself from his wife or her husband, and shall have been continually remaining without the United States for the space of five years together; nor

3. "To any person, by reason of any former marriage, which shall have been dissolved by the decree of a competent court, for some cause other than the adultery of such person; nor

4. "To any person, by reason of any former marriage, which

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shall have been pronounced void by the sentence or decree of a competent court, on the ground of the nullity of the marriage contract; nor

5. "To any person, by reason of any former marriage contracted by such person, within the age of legal consent, and which shall have been annulled by a decree of a competent court; nor

6. "To any person, by reason of any former marriage, with a husband or wife, who shall have been sentenced to imprisonment for life." (3 R. S., 967, 968.)

I. The indictment, within the rules of criminal pleading, does not set forth a criminal offense, and for that reason the judgment should be reversed.

It was clearly necessary to aver that the prisoner did not come within the exceptions alluded to in the eighth section above cited, and set forth in detail in the ninth section, to which the eighth section particularly refers.

It is conceded that in indictments it is not necessary to negative exceptions, *not alluded to* in the enacting clause, which describe the offense, but which are embraced in separate and distinct sections. The correct rule upon this subject, which runs through all the adjudged cases, is stated correctly and with precision in 1 *Chitty's Cr. L.*, 284, as follows: "If the exceptions themselves are stated in the enacting clause, it will be necessary to negative them in order that the description of the crime may, in all respects, correspond with the statute. Thus, in an indictment on the statute which enacts, that if any person shall take, receive, pay or put off any counterfeit milled money, or any milled money whatsoever, unlawfully diminished, *and not cut in pieces*, for a lower rate than its nominal value, he shall be guilty of felony; it is absolutely necessary to state that the money was not cut in pieces, and if those words be omitted, the informality will be fatal. And in an indictment upon the first section of the same act, for keeping a press for coinage, or other crimes thereby created, all the exceptions by which, under that clause, the possession might be lawful, or the defendant in any way derive authority to

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exculpate him, must be expressly negatived. Upon the same ground an information for importing goods from Holland is insufficient, unless it aver that they were not of the growth of that country."

It will be perceived that in our statute of bigamy the exceptions are expressly alluded to in the enacting clause (§ 8, *above cited*), and form a material part of the description of the offense. The language of the enacting clause (§ 8) is, "Every person having a husband or wife living, who shall marry any other person, whether married or single, shall, *except in the cases specified in the next section*, be adjudged guilty of bigamy," &c.

Marrying while a previous husband or wife is living, is not necessarily and of itself a criminal offense. The *criminality* depends upon the existence or non-existence of other facts.

It cannot be successfully maintained that the *exceptions* are matter of defense, and, therefore, need not to be negatived. A review of the authorities will show most conclusively that when the exceptions are referred to, as in this case, in the enacting clause, they should be negatived in the indictment and by the proof on the part of the prosecution.

The authorities on this point are numerous, but the following will suffice:

"The statute (791, *ch.* 58, § 3) provides, in the enacting part, that no innholder, &c., shall entertain any persons, not being travelers, strangers, or lodgers, on the Lord's day, under the penalty of ten shillings for each person so entertained." *Held*, that an indictment on this section or clause should state the precise number of persons entertained, *and should negative that they were travelers, &c.* (*Commonwealth v. William Maxwell*, 2 *Pick. R.*, 139.)

PUTNAM, J., in delivering the opinion of the court in this case (141), observes: "The objection which has been made to the first count, and which we consider as fatal, is, that it does not appear from that count but that the persons entertained were lodgers at the defendant's house, in which case he would not be guilty of any offense. The rule is, that where

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the enacting clause describes the offense, *with certain exceptions*, it is necessary to state all the circumstances which constitute the offense and to negative the exceptions."

Our statute of bigamy in the enacting clause describes the offense "with certain exceptions," the language being, "shall, *except in the cases* specified in the next section, be adjudged guilty of bigamy." It is therefore necessary in an indictment "to negative the exceptions."

PUTNAM, J., in *Com. v. Maxwell* (2 Pick. R., 139, *cited above*), further observes: "In *Rex v. Jarvis* (*cited in 1 East R.*, 643, *note*), Lord MANSFIELD and his associate judges speak of this as a known distinction. That case is reported in *Burr.*, 148. It was a conviction under the game laws, where one of the qualifications, viz., being a gamekeeper, was not negatived, and the conviction was quashed. So in 1st *East's Pl. (ch. 166)*, upon an indictment for counterfeiting coin, all the judges held that it ought to be averred that the party was not employed in the mint or authorized by the treasurer, *because the exception is in the enacting clause and part of the description of the offense.*

An indictment for selling liquors without a license ought to allege that the respondent was not authorized to sell liquors in any mode designated by the statute, particularly negating each source from which he might have obtained a license." (*State v. Sommers*, 3 *Vermont R.*, 156.)

In *Matthews v. State* (2 *Yerger R.*, 233), it was held that where a statute contained provisos and exceptions in separate and distinct sections or clauses, it is not necessary to state in the indictment that the defendant does not come within the exceptions, but that where exceptions *form a part of the enacting clause of a statute, they must be negatived in the indictment, or the judgment will be arrested.* It is held that "an indictment for concealing and secreting counterfeit bank notes, founded on the act of 1813 (*ch. 65, § 1*), must aver that the defendant had not kept, concealed, possessed or secreted said counterfeit bank notes innocently, ignorantly, and without knowing their use and nature." In this case the enacting clause of the statute

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concluded as follows: "Provided always that such person or persons shall not be held, taken, deemed or adjudged guilty, within the meaning of this clause, of any of the offenses therein mentioned, if he, she or they had kept, possessed, had, concealed or secreted, or aided, assisted, or was concerned in the having, keeping, possessing, hiding, concealing, such counterfeit bill or bills, note or notes, *innocently*, ignorantly, and without knowing their use and nature, or who, knowing the same to have been had, kept, possessed, hid, concealed or secreted, shall not discover the same or his or her knowledge thereof, as aforesaid, through innocence, ignorance, and want of knowledge of their use and nature."

WHITE, J., in delivering the opinion of the court in this case (*p.* 237), observes: "If the exceptions themselves are stated in the enacting clause, it will be necessary to negative them in order that the *description of the crime* may in all respects correspond with the statute. Thus, in an indictment upon the first section of the statute (8 and 9 *William III, ch.* 26), for keeping a press for counterfeiting, or other crimes thereby created, *all the exceptions* by which, under that clause, the possession might be lawful, or the defendant in any way derive authority to exculpate him, *must be expressly negatived.*"

In an indictment under the act of 1830, prohibiting any persons other than Indians from making settlements within their territory, it is necessary to aver that the defendant is not an Indian. (*State v. Craft, Walker [Miss.] R.*, 409.)

When an act is constituted an offense by statute, and there is an exception in the body of the statute, which enters into it as part of the description, the exception must be negatived in an indictment for committing the offense. In an indictment founded upon section 1, ch. 82 of the Revised Statutes, which prohibits, on the Sabbath, the exercise of "any secular labor, business or employment, except such only as works of *necessity* or charity, it must be alleged that the act charged as an offense against the statute was not a work of necessity or charity." (*State v. Barker*, 18 *Vermont R.*, 195.)

BURNETT, J., in this case (*p.* 197). observes: "It is neces-

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sary, then, in order to constitute a violation of this statute, that the work complained of should not be a work of necessity or charity; and the effect is the same as if the exceptions in the statute had been in this form, *not being works of necessity or charity*. It would then be quite apparent that the latter words would qualify and explain what kind of labor, business and employment was prohibited."

"An indictment under the act of 1816, to prevent gaming, against a person for permitting persons to play at cards in her house, being a public house, is not good, unless it state that the persons were playing at such games as were not *excepted* in the act; and where a conviction has taken place on such an indictment, judgment will be arrested." (*Reynolds v. State*, 2 *Nott & McCord*, 385.)

NOTT, J., in delivering the opinion of the court, says: "In this case the defendant is merely charged with permitting persons to play cards at her house. And as that is not, under *all circumstances*, unlawful, she may, for anything that the court can perceive, be innocent of any offense."

In *Horn v. State* (1 *Ohio R.*, 16), it was held, that where an exception or proviso entered into and became a part of the description of the offense, or a *qualification of the language* defining or creating it, such exception or proviso should be specifically negatived in an indictment. In that case the defendant was indicted for selling spirituous liquors, under the first section of the act of 1851, at the close of which was a proviso in these words: "Provided that nothing contained in this section shall be so construed as to make it unlawful to sell any spirituous liquors for medicinal and pharmaceutical purposes." It was held that an indictment which did not negative these exceptions was fatally defective, and the judgment below was reversed on this ground. BARTLEY, J., in delivering the opinion of the court, says: "When, therefore, the matter of the proviso or exception in the statute, whether it be embraced within what has been termed the enacting clause or not, enters into and becomes a part of the description of the offense, or a material *qualification* of the language which defines

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or creates the offense, the negative allegation in the indictment is requisite." * * * * *

"In the case before the court, the matter of the proviso in the first section of the act of 1851 points directly to the character of the offense, is in the same sentence with it, and made a material qualification in the statutory description of it."

In the case at bar, the exceptions being specifically alluded to in the eighth section, that section or clause of the statute merely referring to the following section for an enumeration of the sections, the exceptions, to all intents and purposes, are the same as though they had been enumerated in detail in the enacting clause, or eighth section, of the statute. The eighth section provides that one "shall," except in the cases specified, "be adjudged guilty of bigamy," &c., the exceptions being thus incorporated in the eighth section.

In a similar case, involving the same principle of construction, in *State v. Palmer* (18 *Vermont R.*, 570), the court very strongly intimate "that as the exceptions are mentioned in the enacting clause of the fifth section, referring to the next section for the particulars, it should have been alleged that the respondent was not within them."

It has never been held by any recognized authority that it was not necessary, in an indictment for bigamy, to negative exceptions specified, or alluded to, as forming part of the description of the offense, or qualifying the offense (as in our statute). Whenever it has been maintained that it was not necessary to negative such exceptions, it will be found that the statutes did not contain, in the enacting clause, any reference to such exceptions.

Had our statute, in the enacting clause (eighth section), omitted the words, "except in the cases specified in the next section," it probably would not have been necessary to negative those exceptions. In that event, the exceptions stated in a subsequent section would have been, for the purposes of pleading as well as proof, purely matters of defense, as the learned court below charged the jury.

Whether to negative such exceptions by the indictment and

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the evidence on the part of the prosecution, would result in much inconvenience, is not the question. The strict and inflexible rules of criminal law cannot be overturned or modified to suit the convenience of parties.

It is enough to say that the offense of bigamy, as described in the enacting clause of our statute, is not set forth in the indictment. All charged in the indictment may be true, and the prisoner innocent of any offense according to the language and meaning of that 8th section.

II. Penal or criminal statutes must be construed strictly, and in favor of the liberty of the citizen.

HOSMER, Ch. J., in *Daggett v. The State* (4 Conn. R., 63), correctly observes: "The rule has long been established that penal statutes must be construed strictly. * * * More correctly, it may be said that such laws are to be expounded strictly against an offender, and liberally in his favor. * * * In extension of the letter of the law, nothing may be assumed by implication; nor may the mischief intended to be prevented or redressed, as against the offender, be regarded in its construction."

In *Lair v. Killmer* (1 Dutcher, 522), GREENE, Ch. J., says: "In defining the crime and the punishment, penal statutes are to be taken strictly and literally. A penal law cannot be extended by construction." In *State v. King* (12 Louis. R., 593), it was held that, in construing penal statutes, courts cannot take into view the motives of the lawgiver, further than they are expressed in the statute.

III. The learned court below erred in refusing to charge the jury that, in order to justify a conviction, it was necessary to prove that at the time of the alleged marriage between the defendant and Jane A. Butt (the second wife as alleged), the defendant did not come within any of the exceptions mentioned in the 9th section above alluded to.

A. Oakley Hall (District Attorney), for the People.

The court correctly charged that the statutory exceptions were entirely matters for defense.

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1. The elementary rule is thus stated in 8 *Greenl. Ev., Verbo "Polygamy,"* § 208: "The defense may also be made by showing that the prisoner's case comes within any of the exceptions found in the statutes," &c. (*See also Whar. Am. Crim. Law,* § 378.)

2. The reason of this is, that it is affirmative proof. The prosecution is not called upon to prove a negative. The evidence of exception is peculiarly within a defendant's power.

By the Court, CLERKE, J. The counsel for the prisoner requested the court to charge, that, in order to justify a conviction, it was necessary to prove that, at the time of the alleged marriage between the defendant and Jane A. Butt, the defendant did not come within any of the exceptions in part 4, chapter 1, title 5, article 2, section 9 of the Revised Statutes. That is, although the prosecutor proved a second marriage at the time the defendant's wife by the first marriage was living, he should also, for instance, have proved that the first wife was not absent for five successive years without being known to the defendant within that time to be living; and so as to all the other exceptions mentioned in the statute.

It is easy to perceive, if this should be required in every prosecution for what is called bigamy, that the result would be what Lord ELLENBOROUGH declared would be the result in *Rex v. Turner* (5 *Maule & Sel.*, 206), "that there would be a moral impossibility of ever convicting upon such a charge," which was a charge against a carrier for having game in his possession, without the prosecutor's proving that he had not the qualifications which would exempt him from prosecution. "The question," says his lordship, "is upon whom the *onus probandi* lies; whether it lies upon the person who affirms a qualification to prove the affirmative, or upon the informer, who denies any qualification, to prove the negative."

The principle decided in *The Apothecaries' Co. v. Bentley* (1 *Carr. & P.*, 309, 12 *Eng. Com. L. R.*, 537), applies still more accurately to the case before us. That was an action of debt on the apothecaries' act (55 *Geo. III.*, ch. 194, § 20) for a penalty for practicing as an apothecary, without having obtained a

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certificate from the apothecaries' company under that act; it was held it was not necessary to prove on the part of the plaintiffs, that the party had not obtained his certificate; the *onus* lying on him to show that he has.

Brougham, who was counsel for the defendant, contended that it was incumbent on the company to prove this. "If," he continues, "in the act, the certificate had *been mentioned in a separate proviso as an exemption from the penalty*, it would then be matter of defense; but as it was incorporated in the clause which gave the penalty, it must be negatived by an averment in the declaration, and that averment must be proved." The court overruled the objection and decided, as it was in the negative, the proof lies with the defendant. But we need not go further than the case of *Potter v. Deyo* in our own courts (19 *Wend. R.*, 361), to show that it is not necessary for the prosecutor to prove an exception or disqualification in any instance. The *onus probandi*, in all such cases, lies with the defendant.

As to the objection that the indictment did not aver that the prisoner did not come within the exceptions alluded to in the 8th section of the statute, and set forth in detail in the 9th section, there was no objection taken to the indictment on this ground at the trial or at any other time. It is a defect, if at all, in a matter of form, which could not tend to the prejudice of the defendant (2 *R. S.*, 728, § 51), and, therefore, the judgment cannot be affected by it.

It is unnecessary to notice the other points taken by the defendant's counsel. I deem them palpably untenable.

The judgment should be affirmed.

SUPREME COURT. Broome General Term, January, 1863. *Balcom, Campbell, Parker and Mason*, Justices.

HARVEY DONE, plaintiff in error, v. THE PEOPLE, defendants in error.

Section 25 of title 1, ch. 1, part IV of the Revised Statutes (2 R. S., 659), which provided that "the punishment of death shall, in all cases, be inflicted by hanging the convict by the neck until he be dead," was only declaratory of the common law as it existed at the time of the enactment; and the repeal of that section by the act of 1860 (ch. 410), left the common law mode of inflicting punishment of death by hanging, in full force and effect.

For a murder committed in December, 1860, the prisoner was indicted in February, 1861, and tried in April, 1862, and found guilty, and the court gave judgment that the prisoner "suffer the punishment of death prescribed by law for murder in the first degree, and that he be imprisoned in the State prison at Auburn until such punishment be inflicted." On error the judgment was affirmed.

Held, also, that the judgment was not defective in omitting to sentence the prisoner to confinement *at hard labor*. A sentence to confinement in the State prison is necessarily a sentence of imprisonment at hard labor, the statute having prescribed that mode of punishment.

It is only in the case of conviction in the Court of General Sessions of the city of New York, brought up by writ of error, that the appellate court may grant a new trial without any exception having been taken in the court below. Since the amendment of the act of 1855 by the act of 1858, no such power exists in cases of conviction in the Courts of Oyer and Terminer.

A judgment will not be reversed because the court permitted the prosecution to prove the confession of the prisoner to the officer, while under arrest, as to the place where he had secreted money, it appearing that the money was found at the place designated by him.

On a trial in 1862 for a murder alleged to have been committed in December, 1860, the judge, among other things in his charge to the jury, said, "that the governor had refused to issue any warrant for execution under the statute; that he had been advised by the Court of Appeals, in the present state of the law, it was inexpedient to do so," and afterwards said to the jury, "that they had nothing to do with the question of punishment which followed their verdict of conviction of murder; that that belonged to the law, and not to them to decide;" to which an exception was taken. *Held*, that no error was committed available to the prisoner.

THE prisoner was indicted at the February term of the Madison Oyer and Terminer, 1861, for the murder of Calvin Burton, in the town of Sullivan in the county of Madison, on

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the 29th day of December, 1860, and was arraigned and pleaded not guilty. He was tried at the Madison County Oyer and Terminer, on the 7th day of April, 1862, before Mr. Justice MASON and SIDNEY T. HOLMES, county judge, and the justices of the Sessions.

Upon the trial, the prosecution introduced, among other witnesses,

Edwin C. Frederick, who testified as follows: I was present at Watkins' tavern when Done, the prisoner, was arrested; it was at Chittenango depot; it was about noon on Thursday, January 3d, 1861; Thomas A. French and I arrested him; we came from the village of Chittenango to Watkins direct; French was a constable; I had been one, but was not then; I went to help French arrest Done; we went into the bar-room; French inquired for Done; Done was in, eating his dinner; he boarded there; in two or three minutes he came out, and we arrested him; we took him up stairs to his room; before going up stairs, French or I asked him what he had done with those bills he had offered to pass to Mr. Curtis.

The district attorney here offered to prove the prisoner's confessions, and what he said about the bills on this occasion.

The prisoner's counsel here asked leave to examine the witness preliminarily, and the witness being examined preliminarily by the prisoner's counsel, to ascertain if the confession was voluntary, testified:

When French arrested the prisoner, he told him that he arrested him for the murder of Calvin Burton, and he, prisoner, answered, "it is all right;" he did not act much excited.

The prisoner's counsel here objected to the offer of the district attorney, on the grounds:

1st. That the confessions of the prisoner, while under the arrest for the charge of murder, were not admissible.

2d. That it is not shown that they were voluntarily made.

3d. That they were drawn out by the officer who arrested him.

4th. It appears they were obtained by questions put to the prisoner by the officer who arrested him, or those who aided

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the officer in making the arrest, and had him in charge at the time and while under arrest, and therefore were not voluntarily made.

5th. They were made under an excitement and agitation of the prisoner's mind while under arrest, and by questions propounded by the officers and those aiding in his arrest.

The objections were overruled by the court, and the answers, statements and confessions of the prisoner were allowed to be given in evidence, to which decision the prisoner's counsel excepted.

The witness then testified: I asked what he had done with the bills he had offered to Mr. Curtis? The prisoner said the bills were up stairs in his trunk; we three then went up stairs into the prisoner's bedroom; he took out the key to his trunk and unlocked it; we made a thorough search; we searched his trunk and the clothing in the trunk, and his clothes in this room, and in his room searched his bed and bed clothes; we could not find the bills; I said to Done, "it is singular what has become of them if you put them in your trunk yesterday;" I asked him if any one else had had the key to his trunk? He said "no." We then came down stairs and got in the cutter, and took him up to Chittenango, a distance of two miles, for examination; after we had started, we spoke to him again on the subject of his losing those bills, and where they had gone to, and we asked him if he had not been somewhere to spend the money.

The prisoner's counsel here objected to the answers the prisoner gave in reply, for the reasons before stated. The objections were overruled by the court, and the prisoner's statements and reply were allowed to be given in evidence, to which decision the prisoner's counsel excepted.

A. He said, "Come to think, I have; I passed the bill with a hole in it at Bassett's hotel at Manlius Station, a few days previous." I asked him to whom? He said to a boy, Charles Reels, who lived with Mr. Bassett. I asked him if he was sure it was Charles Reels? He said he was. I asked him where he was? He said the boy was in the bar. I asked

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him where he got the bills? He said in Albany, and then he said, or on the canal.

We took the prisoner to Esquire French's office in Chittenango; I then went to Bassett's hotel, Manlius, and found Charles Reels; he is fifteen years old; I took the boy to Esquire French's office in the front room; the prisoner was in the back room; I went in and asked Done if he thought he should know the boy.

The prisoner's counsel here objected to the reply the prisoner then made, and the statements and confessions of the prisoner on that occasion, for the reasons above stated, which objections were overruled by the court, and the reply and statements allowed to be given in evidence, to which ruling and decision the prisoner's counsel then and there duly excepted.

The witness testified: Done said, "Yes;" I opened the door and took the Reels boy in the room; Done was in; I asked him if this was the boy; he said, yes; I saw him about noon at Bassett's hotel in Manlius. The reply which the boy Charles Reels made to Done, was then offered in evidence, which was objected to as incompetent and immaterial, by the prisoner's counsel.

The court decided that no answers to questions propounded by Fredericks and any third person, standing between Reels and the prisoner, were admissible, but that any voluntary conversation between Reels and Done upon that subject might be given, and the answer was excluded, but the witness was allowed to testify as follows:

Done said he was at Manlius depot between 10 and 11 A. M., and saw Reels there, and Reels replied, I was not there that day over half an hour, and that was between 12 and 1 P. M.; I was at school that day; Done said in reply to that, I think that is the boy I passed the bill to; Done said he passed the bill to Reels for a cigar.

The counsel for the prisoner in due time objected specifically to what Reels said, and the whole evidence as above given was allowed to be given, and the prisoner's counsel excepted.

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Joseph H. Dayhash sworn for the People and testified, among other things: I know the prisoner; I kept grocery in the same building where he boarded; I was present at the examination before Esq. French; it lasted two days; at the end of of the first day's examination, while in the office, I asked the prisoner if he could tell what he had done with the two bills he had offered a few days before to Curtis.

The prisoner's counsel objected, for the reasons above stated, to the reply and confessions of the prisoner. The objections were overruled, to which decision the prisoner's counsel excepted.

The witness testified: Done said he could not; I told him that it was singular to me that he had offered those two \$2 bills to Curtis a day or two before, and now could not tell what he had done with them; he said he could not; I told him I thought he could, and he had better have the truth come out about the bills; this was about 5 o'clock and we were getting ready to go home to tea; some one said Done wanted to see me; I came up to him, he put his head up to mine, and Done told me to go and search his bedroom, and every part of it, and you may look under the carpet; he told me not to leave a spot unturned.

The prisoner's counsel in due time made a general objection to all these confessions, on the grounds above stated in Frederick's evidence, but did not make specific objections to the confessions, on the ground that they were elicited by reason of hope or favor, or that it would be better for him to confess. The evidence was allowed, and the prisoner's counsel excepted.

John Case and I then went to Done's room at Watkin's Hotel and examined said room; we found a bunch in the carpet, and put my hand on it, and I took hold of the end next to the wall and slipped it up, and we saw some change there, and one bill; the change (\$3.82) in 3c., 5c., 10c. pieces, and 2 or 3 cents and one old Spanish shilling; this was the pile next; the first bill was a safety-fund bill of Boston, or New York; the next, about a foot from this, we found a \$2.00 bill on the Globe Bank of New York and \$1.00 Oneida bill;

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this carpet did not come to within six inches of the wall, and was just a strip that run along beside his bed; there was nothing standing over this money; I came right there and saw that bunch on the carpet; I took the bills to Esq. French's office; I wrote my name on the backs of these two bills at French's office; these are the two bills; this looks to me like the change I found under the carpet.

All of the foregoing statements and confessions of the prisoner, which were objected and excepted to, as set out in this bill of exceptions, were material and prejudicial to the prisoner on the trial of said indictment.

At the close of the evidence, the presiding judge charged the jury, among other things, as follows:

He read to the jury the sections 2 and 4 and 5 of the act of the legislature of the State of New York, passed 14th April, 1860, chapter 410, defining the crime of murder, and said that the act had been read to the jury by the counsel in summing up, and different views had been expressed by them in regard thereto.

That this act still seemed to retain the punishment of death for murder in the first degree. The statute was one of doubtful construction, that while it seemed to retain the death penalty for murder in the first degree, it had repealed the provisions of the statute in regard to the mode and manner of executing the same. That it was questionable whether it was lawful to inflict the punishment of death under the statute. That the governor of the State had refused to issue any warrant for execution under the statute; that he had been advised by the Court of Appeals, in the present state of the law, it was inexpedient to do so. That if the prisoner at the bar should be convicted of murder in the first degree, the court would impose the sentence that the prisoner suffer the punishment of death, and that in addition, he be imprisoned in the State prison until such punishment should be inflicted.

That whether the execution of such sentence would ever be inflicted, rested with the governor.

The court further charged the jury, that they had nothing

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to do with the question of punishment which followed their verdict of conviction of murder; that that belonged to the law and not to them to decide.

The prisoner's counsel in due time excepted to that part of the charge wherein the court stated that the governor had refused to issue his warrant for execution, and also to that part of the charge that the Court of Appeals had advised the governor it was inexpedient in the present state of the law to issue his warrant of execution.

The jury found the prisoner guilty.

The prisoner, by his counsel, then moved an arrest of judgment, upon the ground that the sentence provided for by chapter 410 of the Laws of 1860, defining the crime of murder and the punishment thereof, could not be executed.

That the act of 1860 repealed the mode of punishment in cases of murder, provided by the Revised Statutes, and that the act of 1861 has repealed the act of 1860, so that the prisoner cannot be sentenced for the crime of murder in first degree, as his rights were fixed under the act of 1860.

Also, that it is unlawful for the court to pass any judgment against the prisoner.

Also, that if the court should sentence the prisoner under the act of 1860, it would be unlawful to execute said sentence.

Also, that by the laws of the land no sentence or judgment against the prisoner can be made or executed in this case or upon this conviction.

The motion was overruled by the court, to which the prisoner's counsel excepted.

The court gave judgment that the prisoner suffer the punishment of death prescribed by law for murder of the first degree, and that he be imprisoned in the State prison at Auburn until such punishment be inflicted.

The record was then removed by writ of error to this court.

David J. Mitchell, for the plaintiff in error.

I. The court erred in allowing the People to prove the confessions of the prisoner, made to French and Fredericks at the

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time of his arrest, in regard to the bills alleged to have been offered Curtis by the prisoner, and in overruling the objection of the prisoner's counsel thereto.

1. Before any confession or statement made by a prisoner can be received in evidence on a criminal case, it must be shown to have been *entirely voluntary*. The burthen of proof upon this point lies with the prosecution. (*Rex v. Swatkins*, 4 *Curr. & Payne*, 548; *The People v. McMahon*, 15 *N. Y. R.*, 385; *Best Prin. of Ev.*, 418; 1 *Greenl. Ev.*, §§ 193, 219, 225, 226; 5 *Cush. R.*, 605, 610.)

a. The prisoner's confessions were not voluntary. He was arrested upon the charge of murder, informed of the charge, and immediately sharply questioned by the officers who made the arrest, in regard to the bills and where they were. (*Wilson's Case*, 1 *Holt*, 597; *The People v. Hartung*, 4 *Park. Cr. R.*, 323; *The People v. McMahon*, 15 *N. Y. R.*, 385, 386; 11 *Vermont R.*, 116; 1 *Mass. R.*, 144; *United States v. Nott*, 1 *McLean R.*, 499.)

b. The prisoner had just been arrested and charged with the murder of Burton, and whether guilty or innocent, must have been under great excitement and agitation. His statements drawn from him then were not admissible. (4 *Park. Cr. R.*, *supra*; *Commonwealth v. Knapp*, 9 *Pick. R.*, 496; 15 *N. Y. R.*, *supra*, 386, 387.)

c. Immediately upon the prisoner's arrest he is taken by the officers to his room, and compelled to help search for the bills. He is sharply rebuked by the officer because they are not found in his trunk, and then questioned by the officer. It is submitted that statements thus extorted are not voluntary within the definition adopted in *The People v. McMahon*.

d. The case of *The People v. Rodgers* (18 *N. Y. R.*, 9) in no wise conflicts with this rule as claimed by the prisoner here; in that case the confession was in no manner extorted by the officers.

II. The court erred in allowing the People to prove the conversations that passed between the prisoner and Reels.

1. The prisoner was then under examination for murder.

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He was suddenly confronted by both the officers and Reels, and was compelled, by direct questions from the officer, to enter into a discussion with Reels.

2. It is submitted to be clear that the statements there and thus drawn out did not proceed from the "spontaneous suggestions of the prisoner's own mind, free from the influence of any extraneous disturbing cause." (*The People v. McMahon, supra.*)

III. The court clearly erred in allowing the witness, Dayhash, to testify to the previous statements made to him in regard to searching the room and looking under the carpet.

1. These statements were drawn out of the prisoner by Dayhash, while the prisoner was under the distress and excitement of an examination charged with murder.

2. They were obtained under a direct promise and strong inducements held out by Dayhash. He says, I told him I thought he could tell, and he had better have the truth come out about the bills. (*Taylor's Case, 5 Cush. R., 605, 610.*)

One of the objections to this evidence was, that the statements were not voluntarily made; this was clearly sufficient.

IV. The confessions and statements of the prisoner allowed to be proved in this case, were, it is submitted, allowed directly against the spirit of the law.

1. The law abhors any and every attempt to compel a man to be the instrument of his own conviction. (*Ward's Case, 15 Wend. R., 231; 1 Greenl. Ev., § 225, 226.*)

V. The court erred in charging the jury, that the Governor of the State had refused to issue any warrant for execution under the statute, and he had been advised by the Court of Appeals, in the present state of the law, that it is inexpedient to do so.

1. The direct effect of this charge was, to lead the jury to a verdict of guilty upon much less evidence than they would have required in the absence of the charge.

2. It was calculated to make the jury unanimous in their opinion that a verdict of guilty was of no more importance to the prisoner, than a conviction of any ordinary felony.

3. This was error. The law requires more evidence and

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greater certainty to warrant a conviction in a capital case, than one of lesser magnitude or in civil cases. (3 *Greenl. Ev.*, § 29.)

4. Suppose the court had charged the jury that no sentence or judgment could be inflicted upon the prisoner upon a conviction, and then immediately upon the return of a verdict of guilty, gave judgment of death against the prisoner, can there be any doubt that the charge would be erroneous? It is believed that, in principle, no difference exists between the supposed case and the one at bar.

5. The subsequent portion of the charge, that the jury had nothing to do with the question of punishment, does not cure the error. The fatal effect upon the prisoner was as certain with the subsequent portion of the charge as without it. It in no manner tended to remove from the minds of the jury the injury done to the prisoner by that portion of the charge complained of.

6. If the charge might have injured the prisoner wrongfully, he is entitled to a new trial. (24 *Wend. R.*, 419; 19 *Id.*, 232; 6 *Hill R.*, 292; 13 *Barb. R.*, 42.)

VI It was equally erroneous for the court to charge the jury, "that it was questionable whether it was lawful to inflict the punishment of death under the statute."

1. This part of the charge being erroneous, the prisoner is entitled to a new trial, although no exception was taken thereto on the trial. (*Laws* 1855, 613; *The People v. McCann*, 16 *N. Y. R.*, 60.)

VII The court erred in giving judgment against the prisoner, and in overruling the prisoner's motion in arrest of judgment.

1. By the statute of 1860, which was in force at the time the alleged offense was committed, there was and is no court or officer authorized to determine the manner in which the sentence of death can be executed, or the mode of death that may lawfully be inflicted. (*Laws of 1860, ch. 410.*)

2. The only law applicable to this case does not provide for the sentence of death. It provides that certain offenses shall

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not be punished with death. The most that can be said is, that the act of 1860 presupposes that other sections existed whereby murder in the first degree was punished by death by hanging. But all those statutes were repealed. There is no punishment for murder in the first degree provided by law. (2 R. S., 935, § 1, 5th ed.; *People v. Hartung*, 22 N. Y. R., 95, 107.)

3. That under said law the officer to whose discretion the manner of executing the sentence may be submitted and determined, may direct that a cruel and unnatural punishment of death may be inflicted, and there could be no legal mode of reviewing that determination by writ of error or otherwise, or by a stay of proceedings. (*N. Y. Const.*, art. 1, § 5; *U. S. Const.*, art. 8, amendments; *People v. Hartung*.)

4. The said law substitutes the arbitrary discretion of some unknown officer or tribunal for the certainty which is required by the Constitution and laws, and introduces a new, unusual and uncertain punishment; and, therefore, the law under which the judgment was given was in violation of, and wholly unauthorized by, the Constitution of the United States and the Constitution of the State of New York.

5. It cannot be argued that when the legislature repealed the provision of the Revised Statutes which provided that the punishment for murder should be by hanging the person by the neck until he should be dead, in such case the person committing the crime could be put to death in the manner prescribed by the common law.

“When the legislature repealed that section of the Revised Statutes, without substituting anything as to the execution of a capital sentence in its place, they necessarily determined that it should no longer be obligatory for the court, by its judgment, or the executive officers, in the performance of their duties, to resort to that method of inflicting the punishment. (2 R. S., marg. 701, § 16, 3d ed., 788; *The People v. Hartung*, *supra*.)

6. No valid legal sentence or judgment of any kind can be inflicted upon the prisoner in this case. It would involve a

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great legal absurdity to hold that a court could give judgment of death against the prisoner, when it could judicially see that the ministerial officer would be guilty of murder if he executed the same.

VIII. It cannot be claimed that this judgment is valid so far as it tends to imprison the defendant, although void wherein it declares death.

1. Such a construction would be against the whole spirit of the act of 1860. It was not the intention of that statute to imprison for life, but for one year, and that construction would convert the act of 1860 into an act to imprison for life for the crime of murder. Clearly, such was never the intention of the legislature.

2. This is one entire judgment upon writ of error brought, though the judgment be erroneous in part only, it must be wholly reversed. (5 Metc. R., 530.)

3. There is no power to sentence to imprisonment under section 4 of the act of 1860, because that act provides that such a sentence can be inflicted only when a person shall be convicted of any crime punishable with death. That punishment as we have before seen was abolished.

IX. The judgment of the court is erroneous. It provides that the prisoner suffer the punishment of death, and be imprisoned in the State prison at Auburn, till such punishment be inflicted.

1. This judgment is wholly unauthorized by law. The statute of 1860 provides that he "shall at the same time be sentenced to confinement and *hard labor* in the State prison until," &c., &c.

2. The judgment given is in effect a sentence to solitary confinement, and is more severe than a sentence in conformity to the act. (*People v. Hartung, supra.*)

The court should, therefore, as the judgment is unauthorized and erroneous, reverse the judgment and discharge the prisoner.

This court cannot give a new judgment against the prisoner, nor send the case back to the Oyer and Terminer for a proper

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judgment. (*King v. Bourne*, 7 *Ad. & Ell. R.*, 58; *Shepherd v. Commonwealth*, 2 *Metc. R.*, 419; *Christian v. Com.*, 5 *Id.*, 530; *King v. Ellis*, 5 *Barn. & Cress. R.*, 395; *Phillips v. Berry*, 1 *Ld. Raym. R.*, 5; *The People v. Taylor*, 3 *Denio R.*, 91, 97; *Müller v. Finkle*, 1 *Park. Cr. R.*, 374.)

X. The indictment in this case, is invalid.

1. It charges the offense of murder as it existed at common law, although such crime was abolished by the act of 1860, and a new definition of the crime substituted therefor.

2. It charges the offense of murder as it was defined by the Revised Statutes, although such offense had been abolished by the act of 1860.

3. It wholly omits in any count to charge that the prisoner was indicted for the crime of murder in the first degree.

A. N. Sheldon (District Attorney), for the People.

I. The mere fact of the prisoner being in custody at the time the confessions were made, is not a ground for the exclusion of this evidence. (*People v. Rogers*, 18 *N. Y. R.*, 9; *Hartung v. People*, 4 *Park. Cr. R.*, 319; *People v. McCollister*, 1 *Wheel. Cr. Cas.*, 392; *People v. Thayer*, 1 *Park. Cr. R.*, 595.)

II. There is no evidence tending to show fright or excitement, but on the contrary, at the time the prisoner was arrested, he said, "it is all right, and did not act much excited." The prisoner talked freely with Reel, and called Dayhash to him and made a voluntary request. And there is not a word of evidence in the case showing fright or excitement.

III. Fright, excitement or agitation of a prisoner's mind consequent upon the fact of an arrest having been made, where no threats or inducements have been held out, will not exclude evidence of confessions. (*Lamb's Case*, 2 *Leach Crim. C.*, 625.)

Because it is assumed in law that a mere arrest, or, which is the same thing, the mere fact of custody, produces fright, excitement or agitation of the mind of the prisoner, then, when the Court of Appeals decided, in the *People v. Rogers*,

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that the mere fact of the prisoner being in custody at the time of making declarations is not sufficient to exclude them," the court by this decision necessarily covered the whole ground ; that any effect upon the prisoner which the law would deem to have been produced by the mere fact of the prisoner being in custody would not render the evidence incompetent. When the court adjudicated the legal effect of the *fact* of custody, the decision comprehended all the consequences which the law would ascribe to, or presume to result from that fact. The fact of arrest or of custody is one of law, and its legal results and effects are constituents of the fact itself— are elements of a *legal condition* upon which the court decided.

IV. The law does not infer any disturbing effects from fear, excitement or agitation of the prisoner's mind, produced by an arrest, sufficient to exclude voluntary confessions.

Thus, in *People v. Thomas* (8 *Park. Cr. R.*, 256), the Court of Appeals held that "where a prisoner *on his arrest* confessed his guilt, the evidence was competent, notwithstanding the prisoner was in an excited state of mind at the time of making it," and on page 260, DEAN, Justice, says : The fear was produced by the arrest, but it has never been held that admissions thus made were not admissible.

In *Ward v. People* (3 *Hill R.*, 396; *S. C.*, 6 *Id.*, 145), the court held that where an officer told the prisoner that the matter could not be settled and immediately arrested him, his confessions were competent.

In *Hartung v. The People*, Judge HOGBOOM says (4 *Park. Cr. R.*, 323), the circumstance that a party was at the time under arrest, is not sufficient to exclude the evidence. (*Regina v. Owen*, 9 *Carr. & Payne R.*, 83; *State v. Clark*, 2 *Bailey R.*, 66; *Thurston's Case*, in *Joy on Confessions*, 13; 1 *Moody Cr. C.*, 27; *Commonwealth v. Mosher*, 4 *Burr. R.*, 464; *Rex v. Jane Richards*, 5 *Carr. & Payne R.*, 318; *Rex v. Derrington*, 2 *Id.*, 418; *People v. McCollister*, 1 *Wheeler Cr. C.*, 392; *Stephen v. State*, 11 *Ga. R.*, 225; *Rex v. Thornton*, *Ry. & Mood Cr. C.*, 27; *Phillipps Ev.*, 110.)

V. A confession will not be rejected merely because it was

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made in answer to questions which assumed the prisoner's guilt. (*State v. Clarissa*, 11 Ala. R., 58; *Com. v. Knapp*, 9 Pick. R., 496, 500-510; *State v. Grant*, 32 Maine R., 171; *State v. Potter*, 18 Conn. R., 166; *People v. Smith*, 3 How. Pr. R., 216, 230; *People v. Smith*, 1 Wheeler Cr. C., 54; 2 Stark. Ev., 52, notes; *Swatkin's Case*, 4 Carr. & Payne R., 548, found in 19 Eng. Com. Law R., 520.)

But the questions did not assume guilt or suggest an answer. The answers were entirely *voluntary*.

VI. The true rule is to exclude *only* those confessions which may have been procured by the prisoner being led to suppose that it would be better for him to admit himself to be guilty of an offense which he really never committed. (*Rex v. Court*, 7 Carr. & Payne R., 486.)

The test is whether the inducement was calculated to make the confession an untrue one. (*Rex v. Thomas*, 7 Carr. & Payne R., 345.)

These cases are approved in *Russell on Crimes* (2d vol., 826), and sanctioned by this court in 3 How. Pr. R., 230.)

Free and voluntary confessions are the highest evidence of guilt. (*State v. Jefferson*, 3 Ired. R., 418; *Campbell v. The State*, 23 Ala. R., 44; *Commonwealth v. Knapp*, 10 Pick. R., 477; *Morgan v. The State*, 11 Ala. R., 289.

In the case at bar, there is no evidence to show these confessions were not free and voluntary.

VII. But it cannot be claimed that these confessions were not voluntary, because the bill of exceptions states that the prisoner's counsel "did not make specific objections to the confessions on the ground that they were elicited by reason of hope or favor, or that it would be better for him to confess."

VIII. The prisoner's counsel obtained permission and examined the witness, Fredericks, fully, to show, if he could, that the confessions were not voluntary. It was for the prisoner to bring his confession within the exception. (*Commonwealth v. Knapp*, 9 Pick. R., 496, 500-510.)

IX. The court held that only voluntary conversation between Reels and the prisoner was admissible. Here the court erred

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if at all, in favor of the prisoner. 1. Because the declarations of third persons assented to by prisoner were competent. (*Commonwealth v. Call*, 21 *Pick. R.*, 515; *State v. Perkins*, 3 *Haynes R.*, 377; *State v. Welch*, 7 *Port. R.*, 263; *Berry v. The State*, 10 *Ga. R.*, 511.) 2. The People are entitled to prove all that was said at the time by any person, which explained or gave point to the language of the prisoner. (*United States v. Tardy*, 1 *Peters C. C. R.*, 458.)

X. The rule, in excluding confessions, has been carried too far, and "justice and common sense have too frequently been sacrificed at the shrine of mercy." (1 *Greenl. Ev.*, 284; *note*.)

XI. A motion, in arrest of judgment, is confined to objections which arise on the face of the record itself. (1 *Archb. Cr. Pr. and Pl.*, 671, *note by Waterman*; 2 *R. S.*, 3d ed., p. 741, §§ 16, 22; *Ingle v. Coolidge*, 2 *Wheat. R.*, 363; *Suydam v. Williamson*, 20 *How. U. S. R.*, 427; *Whart. Cr. Law*, 3048.)

Should it not have been brought up by *certiorari*? (*People v. Cancemi*, 18 *N. Y. R.*, 128.)

Can this "speech of the prisoner," outside the record, be reviewed on this writ of error, which brings up only the bill of exceptions? (*Freeman v. The People*, 4 *Denio R.*, 21; *Wynehamer v. The People*, 2 *Park. Cr. R.*, 382; *People v. Stockham*, 1 *Id.*, 426.)

XII. This murder was committed the 29th December, 1860, when the new act of that year was in effect.

1. The question, then, is: Was murder punishable as an offense in the year 1860?

2. Previous to the act of 1860, the highest penalty known to the law, was inflicted for the crime of murder. That the legislature intentionally left this horrid crime without a punishment, is not contended; but that the legislature unintentionally provided no punishment for the crime, is contended. The argument is, then, that the prisoner should go free, not because of the intention, but because of the unintention of the legislature.

3. But the act of 1860 did not leave the crime without a punishment. The first section of the act declares the punish

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ment for murder in the first degree to be death. The fourth section declares "that any person convicted of any crime punishable with death," shall be "sentenced to suffer such punishment" of death. Also, "at the same time, be sentenced to confinement at hard labor in the State prison until such punishment of death be inflicted." The statute therefore provides two sentences to be pronounced at the same time; 1st, "be sentenced to suffer" death; 2d, "at the same time to be sentenced" to State prison, &c. Now, if this is construed as one sentence, still the parts are independent and harmonious. Because, if the sentence to suffer death cannot be carried out, the sentence "to confinement at hard labor in the State prison until such punishment of death shall be inflicted," may be carried into effect without infringing in the least with the literal reading of the other portion of the sentence.

4. Now, how can it be said that there is no punishment for murder when the act expressly provides a punishment which can be inflicted, to wit, imprisonment in the State prison.

5. "The act places the convict at the mercy of the governor in office at the expiration of one year, and all his successors during the lifetime of the convict." (8 *Smith*, 106, *per DENIO*.)

XIII. At the time this act was passed, by an express section of the statute, "to suffer death by execution" was to suffer death by hanging.

By all law language, both in the statute and in the reports, in the mouth of the courts and in the mouth of the profession, by public usage, by popular sense, at the time this act was passed, the words to suffer death by execution, by universal use and consent, meant to suffer death by hanging. And this known, definite, legal and popular meaning, as old as the earliest judicial records of the State, should be given to the language of this act. We argue, then,

1. That the evident intent of this act is, that the person "sentenced to suffer the punishment" of death, should suffer such punishment by "execution."

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The intention of the legislature is the law. (*Tonnele v. Hall*, 4 *Comst.*, 140.)

"The intention of a statute is sometimes to be collected from the cause or necessity of making it." (*Tonnele v. Hall*, *supra*.)

"What is within the intent is within the letter, and such a construction should be put on a statute as does not suffer it to be eluded." (*People v. Utica Insurance Company*, 15 *Johns. R.*, 358, 380; *Johnson v. Bush*, 3 *Barb. Ch. R.*, 207.)

"In construing a statute the whole shall be taken and effect given to every part." (*Commonwealth v. Alger*, 7 *Cush. R.*, 53, 89; *Ferman v. City of New York*, 5 *Sandf. R.*, 16.)

2. Statutes in *paria materia* are to be consulted for a construction of each other; and this rule includes statutes which have expired or have been repealed. (*Sedg. on Stat.*, 250, citing *Rex v. Loxdale et al.*, 1 *Burr. R.*, 447; *Reg. v. Merionethshire*, 6 *Q. B. R.*, 843; *Reg. v. Stock*, 8 *Ad. & Ell. R.*, 405, 410; *Bussey v. Story*, 4 *Barn. & Ald. R.*, 98, 108.)

a. The word "execution," in the Revised Statutes, is equivalent to the words "hanging the convict by the neck."

3. The word "execute," when used in reference to a judicial sentence pronounced against a party convicted of murder, technically, in law language, and popularly, means death by hanging, according to the custom in this State from the earliest times.

4. The rule of strict construction to penal statutes does not interfere with the above positions.

"This rule has in modern times been so modified or explained away as to mean little more than that penal provisions, like all others, are to be fairly construed according to the legislative intent as expressed in the enactment." (*Sedg. on Stat.*, 326 to 334, citing 4 *Mass. R.*, 478; 14 *Peters R.*, 464; 2 *Peters R.*, 358; 5 *Foster N. H. R.*, 247; 12 *N. H. R.*, 255; 18 *Johns R.*, 498; 6 *Cow. R.*, 290; 17 *Mass. R.*, 359, 362; 8 *Pick. R.*, 870, 874; 3 *Sumner R.*, 209, 211, 212; 1 *Paine's R.*, 83, 84.)

In *King v. Inhabitants of Hodnett* (1 *T. R.*, 96, 101), the

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word "master" in an enactment was construed to include "mistress."

In *Schooner Nymph* (1 Sumner R., 516, 518), where "trade" was held to include "cod fishery."

XIV. The punishment of murder at the common law was by hanging the offender by the neck until he should be dead. The statutory provision declaring that the punishment of death should be thus inflicted, was consequently in affirmance of the prescription of the common law. (8 *Smith*, 107, *per* DENIO.)

Now, does the repeal of the twenty-fifth section of the statute abrogate the common law? We say not, because the repealing act recognizes the "death penalty," and an "execution" of it, and the common law comes to the aid of the new act, and regulates the manner of execution.

By the court, CAMPBELL, J. The prisoner, Harvey Done, was tried and convicted at the Madison County Oyer and Terminer, in April, 1862, of murder in the first degree, and was sentenced to "suffer the punishment of death prescribed by law, and that he be imprisoned in the State prison at Auburn until such punishment be inflicted." Before sentence, the counsel for the prisoner moved in arrest of judgment, on the ground that the sentence provided by the act of 1860, defining the crime and punishment of murder, could not be executed; that the act of 1860 repealed the mode of punishment as provided in the Revised Statutes, and that the act of 1861 repealed the act of 1860, so that the prisoner cannot be sentenced for the crime of murder in the first degree, as his rights were fixed under the act of 1860; that it was unlawful for the court to pass any judgment against the prisoner; that if the court should sentence the prisoner under the act of 1860, it would be unlawful to execute the sentence, and that by the laws of the land, no sentence or judgment can be made or executed in this case:—all and each of which points were overruled, and counsel excepted. The murder of which the prisoner was convicted was committed in December, 1860, after the passage of the act of that year. The punishments in England, when the offender was to suffer death, were

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inflicted in various ways. Under the directions of military courts he was shot. When condemned by ecclesiastical tribunals, he was not unfrequently burnt at the stake, as if his priestly judges designed that the heretic, on going out of this world, should have a foretaste of the punishment to which they also consigned him in the next. For treason against the state the great sword of justice was to fall. The condemned man was sentenced to be hung, taken down while still alive, beheaded, disemboweled and quartered; with few exceptions, however, the axe of the executioner only was used, and the criminal was simply beheaded. If, however, in case of high crimes, especially treason, the prisoner stood mute and refused to plead, he might be sentenced to be pressed to death, a punishment inflicted by placing the prisoner on his back, naked, in a cold dungeon, with his arms and legs extended by cords to the four corners, and with iron or stone laid on his breast, and then left till death from cold, or pressure, or exhaustion, came to his relief. Lastly, for the crime of murder and numerous other felonies, the criminal was sentenced to be hung by the neck till he was dead. In New York we had no conviction, so far as I am informed, of any person charged with heresy. In 1705, during the administration of Lord CORNBURY, the Rev. Francis McKemie was indicted and tried in the city of New York, for preaching without the Queen's (Anne) license. The trial was not in an Ecclesiastical Court, but in the Supreme Court. McKemie was a Scotch Presbyterian, and he defended himself, maintaining with marked ability that preaching the gospel was no crime at the common law; and the jury, notwithstanding the marked partiality of the court against him, rendered a verdict of acquittal. A few years prior to that, Colonel Nicholas Bayard and Alderman John Hutchings were tried, also, in the city of New York, on indictments for high treason. Both were convicted and sentenced to be hung, emboweled and quartered. They were among the most eminent citizens in the province of New York, and their trial and conviction were, as they had often been in England, the fruit of party rancor and judicial cor-

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ruption. The sentences were afterward reversed by directions sent out from the English government. With the exception of the trials of Leisler and Milbourne, both of whom were convicted and executed by hanging, these, I believe, were the only trials for treason in New York while a province. The extreme punishment of emboweling and quartering was never inflicted. Of burning at the stake we have several melancholy instances, none, however, for heresy. This punishment was inflicted, so far as I have been able to ascertain, upon oppressed and despised races. Thus, in 1707, Lord CORNBURY, governor, in writing to the Board of Trade in London, says, that "a most barbarous murder has been committed upon the family of one Hallet, by an *Indian* man slave and a negro woman," and he adds, "I immediately issued a special commission for the trial of them, which was done, and the man sentenced to be hanged and the woman burnt, and they have been executed."

In 1712, Robert Hunter, then being governor of New York, in writing to the Board of Trade, among other things, speaks of a slave insurrection and the killing of several whites by the negroes. He says, the slaves were arrested and "forthwith brought to their trial before the justices of this place, who are authorized by act of assembly to hold a court in such cases. In that court were twenty-seven condemned, whereof twenty-one were executed; one being a woman with child, her execution by that means suspended; some were burnt, others hanged, one broke on the wheel, and one hung alive in chains in the town; so that there has been the most exemplary punishment inflicted that could possibly be thought of." He might well have added, as he did, "which only this act of assembly could justify" (*See vol. 5, Colonial His., pp. 39, 341.*) In 1741-42, there occurred what has become historically famous in this State as the negro plot, wherein love of freedom in the negro, introduction of popery, incendiarism and plunder are combined. Thirteen blacks were burnt at the stake, and one white man and one negro were gibbeted. (*See pamphlet containing trial, and Smith's History of New York, vol. 2, pp. 70-72.*)

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About 1772, or 1773, a negro man was burned at the stake in Johnstown, then the county seat of Tryon county, for a rape committed on a white woman. There may be other instances, but those mentioned are enough to require in the bill of rights that neither "cruel nor unusual punishments shall be inflicted," and also in the Constitution of 1777, to call for the declaration that "freedom of profession and religious worship should be allowed in this State to all mankind," and that the principles of rational liberty required us to "guard against the intolerance wherewith wicked priests and princes have scourged mankind." I have run over this brief outline history of the punishment of death for crimes anterior to the Revolution, for the purpose of showing that there was a cause for the declarations in the bill of rights, and, also, as it tends to shed light on the subsequent legislation in relation to capital punishment in our State. It will be seen, that under that legislation the punishment of death must be inflicted by hanging, and that burning at the stake, quartering and disemboweling, breaking on the wheel and gibbeting alive, would no longer be allowed, whether the power to do so was derived from colonial acts, from the common law, or whether the condemned parties were Indians, negroes or white men. Our bill of rights had declared that neither unusual nor cruel punishments should be inflicted. Burning at the stake, if it had not been an unusual, was a cruel punishment, so was breaking on the wheel, and so was gibbeting alive. All these punishments had been inflicted while New York was an English province. The Revised Statutes of the State declared that "punishment of death shall in all cases be inflicted by hanging the convict by the neck until he be dead." (*Title 1, § 25, ch. 1, part 4, Concerning Crimes and Punishments.*) The 16th section, in title 7 of the same chapter, and part, declares that "all punishments prescribed by the common law for any offense specified in this chapter, and for the punishment of which provision is herein made, are prohibited." When the act of 1860 repealed section 25 there was no punishment prescribed for murder in that first chapter, nor in any other part of the statutes. The

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prohibition no longer extended to the punishment prescribed by the common law for that crime. But the punishment which the common law prescribed was precisely the same as declared by section 25, above quoted. The condemned man was hung by the neck till he was dead. Hanging by the neck was the general mode by which capital punishment was inflicted. The other modes were the exceptions. "If a statute makes any new offense felony, the law implies that it shall be punished with death, viz., by hanging." (*Jacob's Law Dic., title Felony, and citing Hawkin's P. C., 1, ch. 41 and §§ 4, 12, ch. 48.*) The act of 1860 starts in the first section with the declaration that "no crime hereafter committed, except treason and murder of the first degree, shall be punished with death in the State of New York." The 2d section defines what is murder in the first degree. There is no declaration in the act in positive terms that such murder shall be punished with death, though the whole act would seem to proceed upon that assumption. Such affirmative declaration, in my judgment was not necessary. The crime of murder was well known and understood. It commenced with the history of our race, and has accompanied it in all ages, and will probably continue as long as human passions exist.

The punishment has been various among different nations. But in England, throughout her entire history, in the province of New York and in the State of New York, the punishment has always been inflicted by hanging the criminal by the neck. (See English State Trials, commencing in the fourteenth century, in which it will be found that in every case of simple murder the sentence was that the prisoner be hung by the neck.) Of course I do not refer to the killing of a husband by the wife, or a master by the servant or slave, which constituted what was termed petit treason, nor to the acts of assembly for punishment of negroes, already referred to, but murder, as generally understood and defined, and what the legislature must have understood by the term when they enacted the law of 1860. Unless, then, we hold that the repeal of section twenty-five, of the chapter and title of

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the statutes above referred to, also repealed and made null and of no effect the rule of the common law which prescribed the punishment for murder, then this prisoner, who was found guilty of murder in the first degree, should suffer the punishment of death, and that punishment should be inflicted by hanging by the neck till he is dead. As to sections twenty-four and twenty-five, the original note of the revisers was: "The last two sections are new; possibly such would be the present law, but it is so doubtful that it is deemed highly important to declare it." So far as section twenty-five declares what is the mode of punishment of the crime of murder, that is by hanging, I apprehend there could not have been doubt, but as to other crimes, especially treason, there was unquestionably grave doubt. But if section twenty-five simply declared the law, its repeal does not of itself render the law which it declared null and void. In my judgment, therefore, when the act of 1860 repealed section twenty-five, it left the common law mode of inflicting punishment by death, namely, by hanging, in full force and effect, and when this prisoner was sentenced to suffer the punishment of death prescribed by law, he was virtually sentenced to be executed in the mode which the common law required, by hanging by the neck till he was dead. Prior to the act of 1860, the court, when a convict was sentenced to the punishment of death, was required to make out and sign and deliver to the sheriff a warrant stating the conviction and sentence, and "appointing the day on which such sentence shall be executed." (§ 11, *title 1, ch. 1, part 4, R. S.*) Now, by the act of 1860 the convict is not to be executed "until a warrant shall be issued by the governor, under the great seal of the State, directed to the sheriff of the county in which the State prison may be situated, commanding the said sentence of death to be carried into execution." If the act gives to the governor the power, by implication or otherwise, to issue his warrant for the execution of the prisoner, that warrant would fix the time, and doubtless should specify the mode of the execution the same as is pointed out by the common law. But whether the power is given or not, it is

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not necessary for us to determine. The court did all that it was required, and all it could do, when it pronounced the sentence that the prisoner should suffer the punishment of death, and be imprisoned till such punishment be inflicted. If, by reason of a defect in the law, the governor may not have to order his execution, or if, for any other reason, his punishment shall be virtually commuted to imprisonment for life, the prisoner has no cause or right to complain. He committed the crime when the act of 1860 was in full force. He was found guilty of murder in the first degree. A part of the sentence required by that act is, that he be imprisoned until the "punishment of death shall be inflicted." If we are right in the view that the punishment of death by hanging still remained in full force under the common law after the repeal of section twenty-five by the act of 1860, then the sentence of imprisonment may be carried out; because, even if the governor have the power of ordering the execution of the prisoner, he may never see fit to issue his warrant for that purpose. He may thus virtually allow the punishment of death to be commuted for imprisonment. It would only be under the supposition that there was no longer any punishment by death for the crime of murder, and therefore the prisoner could not be sentenced to suffer that punishment, that the ground could be maintained that the imprisonment was but an incident to the death punishment, and therefore must fall with it, so that virtually if there was no law for the sentence that the prisoner should suffer the punishment of death, he could not even be imprisoned. Such was the result that the counsel for the prisoner contended for on the argument in this case.

But, in my opinion, the imprisonment would be legal and right if the punishment of death remains, even though the governor may not feel authorized, under the act of 1860, to issue his warrant for the execution of the prisoner. The nice question which arose in *The People v. Hartung* (22 N. Y. R.), is not in this case. In that, as to Mrs. Hartung, the act of 1860 was passed after the offense had been committed, and it

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was held that the provision for imprisonment in the State prison was as to her *ex post facto* and void, and it was on that ground chiefly, if not entirely, as I read the opinion of the Court of Appeals, that the judgment in that case was reversed and a new trial ordered.

The counsel for the prisoner also contends that the sentence or judgment is unauthorized, because the act of 1860 provides that the prisoner shall be sentenced to confinement and hard labor, and that, in the present case, the sentence is only imprisonment in the State prison, and, therefore, it is more severe than the act authorizes, as it amounts to a sentence to solitary confinement. I think a sufficient answer to this is, that the general statutes in relation to State prisons in this State regulate the matter. The 126th section, page 1093, 3d volume, 5th edition, is as follows: All convicts in a State prison other than such as are confined in solitude, shall be kept constantly employed at hard labor during the day time, except when incapable of laboring by reason of sickness or bodily infirmity." Now, by section 131, page 1094, same volume, it will be seen, that in order to enforce discipline and secure entire submission and obedience, the warden of the prison may confine a convict in a cell, and retain him there until he shall be reduced to such submission and obedience. Hard labor is the rule of the State prison in this State. Solitary confinement is a mode of discipline. I am not aware of any case in which the sentence to the State prison condemns the prisoner to solitary confinement. By section 56, page 960, 3d volume, 5th. edition, it will be seen, that where any person shall be convicted of an offense punishable by imprisonment in a county jail, the court "may sentence such person to be confined in a solitary cell, but such imprisonment shall, in no case, exceed thirty days in the whole." The sentence of the prisoner to confinement in the State prison was necessarily a sentence of imprisonment at hard labor. The law regulating our State prisons determines it and makes the sentence definite and certain in that respect. Were it otherwise, I do not think we could say that the punishment was more severe. The grave controversy which once

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arose as to whether solitary confinement entirely, or solitary confinement at night, with hard labor with others during the day, and which divided the opinions of the friends and promoters of prison reform, had reference rather to the reformation of the prisoner, than to the severity of his punishment. Whether solitary confinement was the most severe punishment, would depend much upon the habits and temperament of the prisoner, and still more on the manner in which it was enforced. Confinement in a dark and loathsome dungeon is one thing; in an airy and ventilated apartment another. The better opinion now prevails, generally, in this country, and has, I believe, become settled conviction in this State, that solitary confinement, at night, and labor in classes during the day, is best, on the whole, for the State, and best for the criminal. As remarked, however, before, the sentence of imprisonment is a sentence to hard labor, as thus understood, labor in classes during the day, and solitary confinement at night, and this only varied when disobedience or disorderly conduct requires solitary confinement and short allowance of food to be resorted to as a part of the discipline of the prison. I do not think the objection as to the sentence in words not stating that the prisoner was to be kept at hard labor, well taken.

On the trial, certain statements made by the prisoner after his arrest, were given in evidence, under the prisoner's objection, but there were no specific objections "on the ground that they were elicited by reason of hope or favor, or that it would be better for him to confess." The act of 1855 was amended, chapter 330, Laws of 1858, striking out "from the Court of Oyer and Terminer of this State," so that it is only in case of trials in the Court of General Sessions in the city of New York, brought up by writ of error, that the appellate court may now grant a new trial, whether any exceptions shall have been taken or not in the court below. But apart from this, even if we should review the matter, I do not think the statements amounted to a confession. The prisoner simply indicated a spot where they might search for the bank bills inquired

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about. Further search was made and the bills were found. They were found under a piece of carpet in the prisoner's room. This fact could undoubtedly have been given in evidence, no matter under what circumstances the statement had been made by the prisoner — I mean the fact of finding the bills.

In *The People v. McMahon* (15 N. Y. R., 386), Judge SELDEN, speaking of confessions not voluntary, such as do not proceed from the spontaneous suggestion of the party's own mind, free from the influence of extraneous disturbing causes, says that the confession is excluded, "because it is in its nature unreliable, and not on account of any impropriety in the manner of obtaining it, and that in this all the authorities agree." In this case, so far as the prisoner gave information or intimated where the bills might be found, he was confirmed by other witnesses. As said by *Phillipps* (vol. 1. p. 116), "that part of his confession in which he has described a particular spot, or the place where the goods were concealed or deposited, would be inadmissible, unless confirmed afterward by the proof of finding them there." In the case at bar, there was that precise confirmation. In the case of *The People v. McMahon*, it must be borne in mind that the question arose as to the statements of the prisoner before the coroner's jury, made under oath. I do not think this case shows, so far as we have the evidence, any serious disturbing causes operating on the mind of the prisoner, which should cause an exclusion of a confession, even if he had made one. But, as remarked, the statement which he did make, confirmed as it was by other witnesses who found the bills in the indicated place, was clearly admissible. (*Cow. & Hill's notes to Phill. Ev.*, note 226, part 1.) In the note this language is used: "There is a strong current of authority running with the text, that both the disclosure and the fact or circumstance connected with and going to its construction, shall also be received in evidence, and they go to the jury with their joint force." This disposes of the only question which can be material, arising out of the admission or rejection of evidence on the trial.

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There was one exception to a portion of the charge, as follows: "The prisoner's counsel, in due time, excepted to that part of the charge wherein the court stated that the governor had refused to issue his warrant for execution, and also to that part of the charge that the Court of Appeals had advised the governor that it was inexpedient, in the present state of the law, to issue his warrant of execution. It was insisted by the counsel for the prisoner, that the direct effect of the charge was to lead to a verdict of guilty upon less evidence than the jury would have required in the absence of the charge. We cannot say whether this is so or not. Generally it may be true, that an intimation given or opinion expressed by the judge as to the guilt or innocence of the prisoner, may have an effect upon the jury. Sometimes, owing to peculiar circumstances, it may be the duty of the judge to give an intimation, or at all events to so present the salient points of a case as to show the inclination of his own mind. But if, as in this case, he leaves fully and fairly the whole question to the jury, it is not error. The judge, after stating a fact that was notorious in the State, that the governor had not issued his warrant under the law of 1860, and that the Court of Appeals had advised that it was inexpedient, instructed the jury that "they had nothing to do with the question of punishment which followed their verdict of conviction of murder, that that belonged to the law and not to them to decide." There was certainly no error in law in this part of the charge, The most that could be said was, that it was the statement of irrelevant matter. The judge, in effect, said that to the jury himself, when he told them that they had nothing to do with the question of punishment. But however that may be, and even though the statement may have an influence on the jury, I do not see that there was any error in law. The whole matter having been submitted to the jury, they were told that their verdict had nothing to do with the question of punishment. That belonged to the law and not to them to decide.

The conviction and judgment of the Oyer and Terminer should be affirmed.

NEW YORK GENERAL SESSIONS, February, 1863. *John T. Hoffman*, Recorder.

THE PEOPLE *v.* PETER HEFFERNAN.

An indictment will not be quashed on the ground that it was found and presented by the grand jury pending an examination of the same charge before a police magistrate.

MOTION to quash an indictment. The question involved is fully stated in the opinion of the court.

S. H. Stuart and *Charles S. Spencer*, for the prisoner.

Orlando L. Stewart (Assistant District Attorney), for the People.

BY THE COURT. In the case of *The People v. Horton* (4 *Park. Cr. R.*, 222), the Superior Court of Buffalo held that a motion to quash an indictment, on the ground that it was found when an examination was pending before a magistrate, was frivolous.

In the case of *The People v. Hyler* (2 *Park. Cr. R.*, 566), Judge COWLES, adopting the language of Judge ROBERT H. MORRIS, says: "It cannot be denied that the grand jury have full power to make inquiry and present by indictment all persons charged with crime, and that, too, whether such persons are or are not under arrest and examination before any magistrate of the county."

It is not claimed by the defendant's counsel that the legislature has anywhere expressly prohibited action by the grand jury pending an examination before a magistrate; but it is insisted that the statute providing for such examination contains an implied prohibition. I am unable so to understand these statutes, and do not believe that the legislature, if it had intended so materially to interfere with the well-established jurisdiction and powers of grand juries, would have failed to express such intention in unmistakable language.

As a general rule of practice, it is, as I have often had occasion to say, better to have an investigation before a magistrate in the first instance, and not to indict while such examination

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is pending. But cases may often arise where this rule might, with propriety, be departed from. The grand jury, acting under the obligation of their oaths, must determine, as cases are presented, whether they will or will not act upon them prior to an examination before a magistrate, and while such examination is pending. If it were otherwise, it is plain to see that justice might be often delayed, if not entirely defeated.

I am not informed what reason influenced the grand jury in acting upon this case, while the examination in the police court was incomplete. It is enough for me to know that, in acting, they did not exceed their powers; and I have a right to assume that they did not abuse their discretion.

Defendant's counsel has referred me to the case of *Drury*, where it is claimed that Judge EDMONDS quashed the indictment on the ground that it was found pending an examination. I cannot find that any opinion of the learned judge was ever filed, or that the records show that any such decision was made.

I have also been referred to the case of *Camp and Wilkes*, decided in this court when JOHN B. SCOTT was recorder. It is well known that that was the decision of the two lay members of the court, as it was then constituted, and that the recorder did not concur. It has never been considered an authority.

Another consideration in this case is conclusive. Defendant, after his arrest, had given a bond to appear and answer to any indictment which might be found against him. That being done, it was, by law, the duty of the magistrate to return the same, with all other papers, to the clerk of this court within ten days. It is not sufficient to say that this bond was given (as is said to be the common practice) as a matter of convenience, with the understanding that the examination was to proceed as if no bond had been given. The bond, once given, is, of itself, an answer to a motion to quash on the ground that an indictment was found before the examination of the magistrate was, in fact, concluded.

The motion must be denied.

SUPREME COURT. New York General Term, May, 1863.

Sutherland, Barnard and Clerke, Justices.

JAMES RHODIHAN, plaintiff in error, v. THE PEOPLE, defendants in error.

Where a person is tried on an indictment charging him with stealing from the person property of more than twenty-five dollars in value, and it is proved on the trial that the property stolen from the person was of less than twenty-five dollars in value, it is erroneous for the court to refuse to charge that the defendant can be found guilty of petit larceny only, and to charge that, if the defendant stole from the person the sum of eighteen dollars only, he may be found guilty of the offense charged in the indictment.

It is the duty of the court, in such a case, to instruct the jury to find whether the property stolen from the person was worth more or less than twenty-five dollars.¹

THE defendant was indicted, charged with having, on the 31st day of January, 1862, at the city of New York, stolen certain moneys, &c., to an amount exceeding twenty-five dollars, from the person of Sarah Sidney, and pleaded not guilty.

The indictment was brought on for trial, in the Court of General Sessions of New York, in March, 1862, before JOHN H. McCUNN, city judge, and a jury.

On the trial, it was proved by the prosecution that the defendant stole from the person of Sarah Sidney, on or about the 30th day of January, 1862, twenty-three dollars and thirty-one cents, whilst said Sarah Sidney was in a stage in Grand street, in said city.

No evidence was given, proving, or tending to prove, that the defendant stole any other or greater sum than above specified.

No evidence was given on behalf of the defense. The district attorney asked for a verdict of guilty under the indictment.

¹ NOTE. — The 33d section of chap. 608 of 1860, under which this indictment was found, was applicable only to the city of New York; but, by the 2d section of chap. 374 of 1862, the same law is made applicable to the entire State.

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Counsel for the defendant asked the court to charge the jury that they could only find the defendant guilty of petit larceny.

The court refused so to charge, to which the counsel for defendant excepted.

The court then charged the jury, that, if they found the defendant stole from the person of Sarah Sidney the sum of eighteen dollars, they might render a verdict of guilty under the indictment; to which the counsel for defendant excepted.

The jury returned a verdict of "guilty" on the whole indictment, and the prisoner was sentenced to imprisonment in the penitentiary for the term of two years.

A writ of error was then brought to this court.

Henry L. Clinton, for the plaintiff in error.

The court below erred in charging the jury, "that if they found that defendant stole from the person of Sarah Sydney the sum of eighteen dollars, they might render a verdict of guilty under the indictment."

The court charged the jury that they might convict of *grand* larceny from the person, upon a state of facts constituting *petit* larceny from the person.

The statute (*Session Laws* 1860, p. 1016, § 38), under which the prisoner was convicted, provides in substance that whoever shall, in the city and county of New York, steal from the person of another, "may be punished as for *grand* larceny (not *convicted* of *grand* larceny), although the value of the property taken shall be less than twenty-five dollars." The Court of Appeals accordingly held, in *Williams v. The People* (24 N. Y. R., 405), that a charge precisely like the one excepted to in the case at bar, was erroneous, and granted a new trial on that ground.

In *Williams v. The People*, the court below charged the jury "that if they found that the defendant stole from the person of Eliza Denike the sum of seven dollars, they might render a verdict of guilty under the indictment." (p. 406.) The charge of the court below, in the case at bar, was in the very words of the charge in the case of *Williams v. The People*, the

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only difference being that the sum specified in the one case was seven dollars, and the other was eighteen dollars. This amount however, is immaterial, as long as the sum in neither case was over twenty-five dollars, that being the dividing line between petit and grand larceny. In *Williams' case*, the court held that the words, "may punish as for grand larceny," did not mean "*shall* punish as for grand larceny," but that it was discretionary with the court whether to punish as for a *grand* or *petit* larceny. Upon conviction for grand larceny, the sentence could not be for less than two years' imprisonment.

The only statutory provisions relative to the punishment for grand larceny, whether from the person or otherwise, are the following:

"Every person who shall be convicted of the felonious taking and carrying away the personal property of another, of the value of more than twenty-five dollars, shall be adjudged guilty of grand larceny, and *shall* be imprisoned in a State prison for a term not exceeding five years." (3 *R. S.*, 958, § 65, 5th ed.)

"Whenever any person, under the age of twenty-one, and above the age of sixteen years, shall be convicted of an offense punishable with imprisonment in the State prison, in either of the judicial districts of the State, having a penitentiary within said judicial district, the court, before which such conviction shall be had, may, in its discretion, sentence the person so convicted to imprisonment in the penitentiary situated in that judicial district." (*Laws* 1856, p. 251, § 1.)

It will be perceived that upon the general verdict of guilty, on the indictment in the case at bar, the court below was compelled to sentence the prisoner for not less than two nor more than five years' imprisonment. The law of 1856 did not lessen the *term*, but merely gave the court power, in its discretion, to select a different *place* of imprisonment when the convicts were between certain ages. The conviction, under the charge of the court for *grand* larceny from the person, instead of *petit* larceny from the person, was fatal to the legal right of the prisoner in this case, as in the case of *Williams v. The People*

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(*supra*). From the fact that Rhodihan was sentenced to "the penitentiary of the city of New York for the term of two years," instead of the State prison, the presumption is, that the court below ascertained that he was between the ages of sixteen and twenty-one; but this consideration does not take away from the prisoner his legal right, specifically adjudicated in the case of *Williams v. The People*, to have a verdict of *petit* larceny from the person; because, upon the rendition of such a verdict the court might, in its discretion, award to him only the punishment prescribed by statute for one "adjudged guilty of *petit* larceny," which is, that he "shall be punished by imprisonment in a county jail not exceeding six months, or by a fine not exceeding one hundred dollars, or by both such fine and imprisonment. (3 R. S., 971, § 1, 5th ed.)

In *Williams v. The People* (24 N. Y. R., 409), DENIO, J., in delivering the unanimous opinion of the court, says: "If the amount stolen had been truly stated in the verdict, the judgment might, notwithstanding the statute, have been that annexed by law to a simple *petit* larceny. As the judge who tried the issue was also to pronounce the sentence, it is altogether improbable that the error in form, which I suppose to have been committed, has at all prejudiced the defendant. But it is very plain to my mind that an accused person has an *absolute right* to have such instructions on matters of law given to the jury as will shield him from a verdict for a different and higher offense from that of which he is proved guilty." Upon this precise point the Court of Appeals unanimately granted a new trial.

In the case at bar, Rhodihan was proved guilty of one offense, and the court, by charging the jury that they "might render a verdict of guilty under the indictment," charged them in substance that they might render "a verdict for a different and higher offense from that of which he was proved guilty." This was clear and unmistakable error.

A. Oakley Hall (District Attorney), for the People.

The record shows that the plaintiff in error was convicted, not by a general verdict of guilty, "of the *felony* above

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charged in the form aforesaid, as by the indictment aforesaid is above alleged against her" (which was the record in the *Williams case*), but was "in due form of law tried and convicted by a jury on an indictment for larceny from the person of one Sarah Sydney, the personal property of one John J. Sydney."

Therefore, the conviction of this plaintiff in error was one in accordance with the statute, and is distinguishable from the *Williams* precedent.

1. The Court of Appeals, in the *Williams case* (pp. 408, 409), emphasize the "*general verdict* of guilty" as the matter injuring the prisoner.

And that court so disposed of the questions of unconstitutionality and petit larceny that they cannot be argued now.

2. In the error book before the court the evidence of the sums stolen, in connection with the verdict, shows conclusively that it was not a conviction for *grand* larceny, but for petit larceny from the person.

a. True, the record says simply "larceny;" but it adds, "from the person." Now, there can be *grand* larceny from the person *only* when it is stolen in the night time (§ 65, *R. S., on Larceny*). And the indictment does not allege such a season for the larceny.

Thus, a verdict guilty of larceny from the person would point to the "petit" species of larceny from the person.

Unless the adjective *grand* is prefixed, the presumption is (*in favorem libertatis*) that the word larceny means "petit."

3. The direction of the court in *Williams' case* was that they might render a *general* verdict of guilty.

a. The Court of Appeals, in *People v. Guenther* (24 N. Y. R., 100), have shown a liberal disposition in construing a verdict, when the record and the evidence together become explanatory of the verdict.

b. Although the bill of exceptions interpolates "verdict of guilty on the whole indictment," nevertheless it cannot contradict the record, which states the verdict.

4. The conviction should be affirmed, and, if the prisoner

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relies upon the entry of verdict as in bill of exceptions, and the court think it material, he should be put to allegation of diminution of record, and again bring the point before the court.

By the court, CLERKE, J. I confess I am unable to distinguish this case from that of *The People v. Williams* (24 N. Y. R., 405). In that case, the counsel for the defendant asked the court to charge the jury that they could only find the defendant guilty of petit larceny; but the court refused, and the counsel excepted. The court thereupon charged the jury that, if they found that the defendant stole from the person of Eliza Denike the sum of seven dollars, they might render a general verdict of guilty under the indictment; to which the defendant's counsel excepted. In this case, in precisely the same words, the counsel for the defendant asked the court to charge the jury that they could only find the defendant guilty of petit larceny; the court refused, and the defendant's counsel excepted. The court then charged the jury that, if they found the defendant stole from the person of Sarah Sidney the sum of eighteen dollars, they might render a verdict of guilty under the indictment; to which the counsel for the defendant excepted. The only difference between this part of the charge in this case and the corresponding part in the *Williams case*, is the omission of the word "general" before the word verdict in the former; which, of course, is an unessential difference.

The counsel for the People, however, insists that, by the record, the conviction is essentially different in this case from that in the *Williams case*. In this case the record says that the defendant was, in due form of law, tried and convicted by a jury on an indictment for larceny from the person of one Sarah Sidney, &c.; whereas, in the *Williams case*, "the defendant was found guilty of the felony above charged, in the form aforesaid, as by the indictment aforesaid is above alleged against him." The words are somewhat different; but I cannot find any essential difference in these records of conviction. In both cases, the indictments charge the defendants with crimes constituting grand larceny—in the one case of stealing property

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exceeding the value of twenty-five dollars from the person of Sarah Sidney; in the other, of stealing property exceeding that amount from the person of Eliza Denyke. The conviction, then, as it appears on the record, is a conviction in both cases of grand larceny; which is not the crime of which either was actually guilty, although made liable by the act of 1860 to the punishment attached to grand larceny. Although liable to this punishment, still it is settled by the Court of Appeals that the court is not compelled to award it; but the judgment might, notwithstanding the statute, have been that annexed by law to a simple petit larceny, if the court deemed such a mitigation of punishment advisable. As the conviction, however, is recorded in this case, the court had no discretion as to the period of the punishment. This conviction, under charge of the court, for grand larceny from the person, instead of petit larceny from the person, compromised the rights of the defendant, as the conviction of a general verdict of guilty compromised the right of Williams in the case to which I have adverted.

The judgment should be reversed, and a new trial ordered.

SUPREME COURT. New York General Term, September, 1863.
Sutherland, Ingraham and Leonard, Justices.

THE PEOPLE v. JOHN RILEY.

Form of a *certiorari* to a Court of Special Sessions and of a return thereto, and, also, of the complaint taken before the magistrate, and of the recognizance taken to appear before the Court of Special Sessions.

Where a person arrested and brought before a magistrate in the city of New York, under a charge of petit larceny, presented to a magistrate a writing, signed by him, in which he waived a jury and demanded to be tried before a Court of Special Sessions, it was held that he waived thereby his right, when subsequently brought before the Court of Special Sessions, to demand a jury, and to have his case removed to the General Sessions, and also his right of appeal to the General Sessions, under 2 R. S., 715, § 26.

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THIS case came up on *certiorari* to a Court of Special Sessions.

On a petition of John Riley, verified by his counsel, W. F. HOWE, the following writ of *certiorari* was allowed :

The People of the State of New York, to Richard Kelly, James R. Steers and James H. Welsh, Esquires, Police Justices of the city and county of New York, GREETING :

We having been informed that John Riley, of said city, was lately in a Court of Special Sessions of the Peace, held before you, convicted of petit larceny, and being willing for certain causes, to be certified of said conviction, and of the complaint, proceedings and judgment against said John Riley, do command you that the original complaint, the proceedings, testimony and judgment, with all things touching the same, by whatsoever name the party may be called therein, you send to the justices of our Supreme Court in and for the city and county of New York, distinctly and plainly, under your hands and seals; and that you cause this writ, and the affidavit delivered to you therewith, and your return thereto, to be filed in the office of our Supreme Court of Judicature, at the city hall, in the city of New York, on the first Monday of September, 1863.

Witness, Honorable GEORGE G. BARNARD, one of the justices of our Supreme Court, at the city hall, in the city of New York, this 1st day of August, 1863.

[SEAL.]

H. W. GENET, *Clerk*.

W. F. HOWE, *Attorney*.

(Indorsed.) "I hereby allow the within writ.

1st August, 1863.

GEORGE GOULD."

To which the following return was made by the Court of Special Sessions.

City and County of New York, ss :

The undersigned, police justices in and for the city and county of New York, and justices of the Court of Special Sessions in said county, named in the annexed writ, certify

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and return to the Supreme Court, that on the 7th day of July, 1863, John Riley was brought before Joseph Dowling, Esq., one of the police justices in and for the city of New York, charged with petit larceny, upon the complaint, on oath and in writing, of George W. Barnett (a copy of which is annexed, marked A), and the said Riley thereupon (as appears by the paper annexed, marked B) elected and required to be tried for said alleged offense, by the Court of Special Sessions in said county, and also entered into a recognizance with surety, conditioned for his appearance at said court, to answer the complaint aforesaid (a copy of which recognizance is annexed, marked C).

The undersigned further return, that on the 30th day of July, 1863, they were, at the halls of justice in said city, duly associated and convened as a Court of Special Sessions for the trial of misdemeanors. And the said court having met, caused the said John Riley to be brought before them for trial for the offense specified in the said complaint; and the charge was then and there distinctly read to him, and he was required to plead thereto. By advice of counsel, the defendant refused to plead, and asked to have the case removed to the General Sessions, and demanded to be tried by a jury, which motion was denied by the court, and the court thereupon directed the clerk to enter and record a plea of not guilty. The said plea of not guilty was accordingly entered in the minutes of the court.

The court thereupon proceeded to try the said issue, and called to the stand George W. Barnett, the complaining witness, who, after being duly sworn by the clerk, testified as follows:

George W. Barnett: This person, the prisoner, came in and asked if he could have some pictures, and asked if he could sit in the afternoon; I asked him to take his chance, and said it would be better to have his address, and his turn would come the sooner; he asked for pen, ink and paper to write; I took him to the desk, and as I was suspicious of him, I sat at the opposite side of the desk, and I noticed the drawer open;

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the clerk saw it too, and asked if he should arrest him; I said no, wait till he gets through; after that I told the clerk to go for an officer; he went and found an officer, and I mentioned to the policeman the bills the prisoner had stolen before he was searched; on searching him we found the two bills I had described; one was on the Tompkins County Bank, and the other was on the Park Bank; they were both \$5 bills; they belonged to John Barnett; I told the officer the bills and denominations previous to his finding them; they had been received by me a few minutes before this; that was the reason I recollected them.

The court to the prisoner: Have you any questions to ask this witness?

Counsel: I decline to examine him.

John E. Sparrow was next called, and after being duly sworn, testified as follows:

Q. State what you know in relation to this matter?

A. The complainant came out to me, and I went in; he then told me the circumstances about this young man, and I arrested him; and he wished me to search him; I did so, and found two \$5 bills concealed in his sock; I told him to take his shoes off, and then his socks; when I arrested him he was at No. 585 Broadway, on the second floor; complainant identified the bills; he told me the names of the banks before I found the bills, and also the denomination of the bills; they were the same as he described.

The court to prisoner: Young man, have you any witness?

Prisoner makes no answer.

After having heard the proofs and allegations in the case as above, the court found and determined that the said John Riley was guilty of the offense charged in the said complaint, and adjudged that he should be imprisoned in the penitentiary of the city of New York for the term of six months. A copy of the record of said conviction and judgment of the court is annexed, marked D.

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Given under our hands and seals this thirty-first day of August, 1863.

RICHARD KELLEY, [seal]

JAMES R. STEERS, [seal]

JAMES B. WELSH. [seal]

(A.)

POLICE COURT, HALLS OF JUSTICE.

City and county of New York, ss:

George W. Barnett, of No. 585 Broadway street, being duly sworn, deposeth and saith, that on the 7th day of July, 1863, at the ward of the city of New York, in the county of New York, was feloniously taken; stolen and carried away from the possession of deponent the following property, viz.:

Two bank bills, of the value and denomination of five dollars each — \$10 — the property of John Barnett, and that this deponent has probable cause to suspect, and does suspect, that the said property was feloniously taken, stolen and carried away by John Riley, now present, from the fact that said bills, which are now produced and identified by deponent, were in a drawer in said store; deponent saw said Riley open said drawer.

Deponent is informed that said bills were found on the person of said Riley.

GEORGE W. BARNETT.

Sworn before me, this 7th }
day of July, 1863, }

JOSEPH DOWLING, *Police Justice*.

City and county of New York, ss:

John E. Sparrow, of the 28th precinct, being duly sworn, says, that on this day deponent found the two bank bills now produced and identified by George W. Barnett, in the stock-ing of John Riley, now present.

JOHN E. SPARROW.

Sworn before me, }
July 7th, 1863, }

JOSEPH DOWLING, *Police Justice*.

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(B.)

The People
v.
John Riley.

On complaint of John Barnett for petit larceny.

After being informed of my rights under the law, I hereby waive a trial by jury, on this complaint, and demand a trial at the Court of Special Sessions of the Peace, to be holden in and for the city and county of New York.

Dated July 8th, 1863.

JOHN RILEY.

(C.)

City and County of New York, ss :

Be it remembered that on the 8th day of July, in the year of our Lord, 1863, John Riley of No. _____ street, in the city of New York, and Theodore Allen, of No. 79 Mercer street, in the said city, personally came before the undersigned, one of the police justices in the city of New York, and acknowledged themselves to owe to the People of the State of New York, that is to say : the said John, the sum of five (5) hundred dollars, and the said Theodore, the sum of five (5) hundred dollars, separately, of good and lawful money of the State of New York, to be levied and made of their respective goods and chattels, lands and tenements, to the use of said people, if default should be made in the condition following, viz :

Whereas, the said John was charged, before the undersigned police justice as aforesaid, on the oath of George W. Barnett, with misdemeanor, for having, on the 7th day of July, 1863, in the city and county of New York aforesaid, taken, stolen and carried away from the possession of complainant, two bank bills of the value of ten dollars, property of John Barnett.

And whereas, he has been brought before said justice to answer said charge, and upon the examination of the whole matter, pursuant to statute, it appearing to said justice that said offense has been committed, and that there is probable cause to believe said accused to be guilty thereof; and the said accused having elected to have his case heard and determined by

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the Court of Special Sessions in said city and county ; and the said offense being bailable by said justice, he did thereupon order the said accused to find *sufficient bail* in the sum of five (5) hundred dollars, for his appearance at the Court of Special Sessions in said city and county, to answer to the complaint preferred against him for said offense.

Now, therefore, the condition of this recognizance is such that, if the above named John shall, personally appear at the Court of Special Sessions, to be held at the Halls of Justice in said city and county, on the 16th day of July, 1863, to answer to the complaint preferred against him, for said offense, and abide the order of the said court, and not depart therefrom without leave, then this recognizance to be void ; otherwise, to remain in full force.

JOHN RILEY,
THEODORE ALLEN.

Taken and acknowledged before me, {
the day and year aforesaid, }
JOSEPH DOWLING, *Police Justice*.

City and County of New York, ss :

Theodore Allen, the within named bail, being duly sworn says, that he is a householder in said city, and is worth five (5) hundred dollars, over and above the amount of all his debts and liabilities ; and that his property consists of stock of liquor store, at No. 79 Mercer street, in said city.

THEODORE ALLEN.

Sworn before me, this {
8th day of July, 1863, }
JOSEPH DOWLING, *Police Justice*.

(D.)

At a Court of Special Sessions of the peace, holden in and for the city and county of New York, at the Halls of Justice of the said city, on Thursday, the 30th day of July, in the year of our Lord one thousand eight hundred and sixty-three.

Present—The Honorable RICHARD KELLY, JAMES H. WELSH and JAMES R. STEERS, Justices of the said Court. Police Justices of the city of New York.

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The People of the State of New York
v.
John Riley.

On conviction, by the oath of a credible witness, of *petit larceny, goods, &c.*, of John Barnett.

Whereupon it is ordered and adjudged by the court, that the said John Riley, for the misdemeanor aforesaid, whereof he is convicted, be imprisoned in the penitentiary of the city of New York for the term of six months.

(A true extract from the minutes.)

ROBERT H. JOHNSTON, *Clerk*

W. F. Howe, for the prisoner.

A. Oakley Hall (District Attorney), for the People.

I. The prisoner demanded a trial at the Special Sessions according to the provisions of the Revised Statutes, and, therefore, that court had exclusive jurisdiction.

II. The court had a *discretion* to send to the General Sessions the complaint for trial, &c., but it refused so to exercise its discretion.

III. There is no right of appeal when there has been a demand for trial at Special Sessions, and the court properly declined to enter the appeal if demand was made, which does not appear by the return, and only by the petition. (3 *R. S.*, 5th ed., p. 1009, p. 52.)

IV. These provisions, giving the Special Sessions jurisdiction to try without a jury, are salutary, because thereby the higher courts are kept free for more important cases.

1. The Constitution provides for trials of *petit larceny* without a jury.

2. The statute gives a prisoner the right, however, to demand a trial by jury if he chooses so to do.

3. When he makes his election, it is binding, subject to an *after discretion* of the court.

V. There is nothing in the return or record to show that prisoner below was misled or defrauded of his rights, or

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that he made his waiver unduly. Therefore, the judgment of the court below should be affirmed.

By the Court, LEONARD, J. The defendant was arrested on a charge of petit larceny, and, on being brought before a magistrate, demanded, in writing, to be tried by the Court of Special Sessions. When arraigned afterwards before that court for trial, he insisted upon being tried by the Court of General Sessions, and refused to plead. The Court of Special Sessions entered a plea of not guilty, and proceeded with the trial; and after hearing the evidence offered by the People, the prisoner still refusing to offer any evidence, or to cross-examine the witnesses who had testified against him, the Court of Special Sessions sentenced the prisoner to the penitentiary for six months. The case is now brought before this court on *certiorari* for review.

Counsel for the defendant insists that he has been deprived of a trial by jury, in violation of the provisions of the Constitution securing to every person the right of trial by jury in all cases in which it has been heretofore used. (*Const. of N. Y.*, § 2.)

Courts of Special Sessions are held, and minor offenses are there tried and judgment rendered without the intervention of a jury.

It is only necessary to refer to the statutes of this State to ascertain that petit larceny, first offense, was triable before the Special Sessions, when the accused demanded such trial, long before the adoption of the present Constitution. (2 *R. L.*, 507, 508.)

While the State of New York was still a colony, petit larceny and other offenses under grand larceny were triable before the justices of the quorum, without a jury. This was the law at the time of the Revolution; and no Constitution of this State has ever interfered with the validity of laws authorizing the trial of offenses of a minor character before the Special Sessions without a jury.

The student is referred, for a more complete history of trials in the Special Sessions without a jury, to the case of *Murphy*

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v. *The People* (2 *Cow. R.*, 815), and the opinion of Judge WALWORTH, in the case of *Jackson ex dem. Wood v. Wood*, to be found in the same volume, in an extended note to the case of *Murphy*. The same question was there raised and fully discussed.

The statutes of this State do, however, secure to the accused a trial by jury, unless he demands to be tried before the Court of Special Sessions, or omits, for twenty-four hours, to enter into the proper recognizances to entitle him to be discharged from close custody. (3 *R. S.*, 1008, 1009, §§ 48, 49, 5th ed.) And the right to obtain a jury trial is further secured by statute even at the time of trial and sentence, if the prisoner has not demanded a trial at the Special Sessions. (§ 52.)

It is quite clear from these provisions that the right to appeal or to demand a trial at the General Sessions, is gone when the accused has demanded in writing a trial at the Special Sessions.

The judgment must be affirmed.

SUPREME COURT. New York General Term, February, 1863.
Ingraham, Clerke and Barnard, Justices.

ALBERT UHL, plaintiff in error, v. THE PEOPLE, defendants
in error.

On a trial for murder, the court charged the jury that if they found that the prisoner was justified in defending himself, and carried that protection further than was necessary for his defense, then he was guilty of manslaughter in some one of the four degrees. This, being unexplained by any other part of the charge, was held to be erroneous, inasmuch as it denied to the prisoner the right the law gave him to slay his assailant, if he was attacked under such circumstances as furnished him reasonable ground for apprehending a design to take his life, or to do him some great personal injury.

THE plaintiff in error was tried in the New York General Sessions in December, 1861, for the murder of one Lee, on

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the 5th of August of that year. The prisoner was barkeeper for Louis Bleyart, at a liquor store kept by him on the corner of West and Morris streets, in the city of New York. The deceased, in company with several others, came to Bleyart's place, and had several glasses of liquor, when a difficulty arose in regard to paying for them. During the fracas the prisoner struck one of the party with a club; after this the deceased seized a large pewter pitcher, filled with water and ice, and was in the act of striking the prisoner with it, when the latter drew a pistol and shot the deceased, who soon after died.

It was proved on the trial that the pitcher was a deadly weapon.

It was contended that the prisoner acted in self defense, and that the homicide of the deceased was justifiable.

Among other things, the court below charged the jury that if they found that the prisoner was justified in defending himself, and carried that protection farther than was necessary for his defense, then he is guilty of manslaughter in some of the four degrees.

To this the prisoner's counsel excepted.

The prisoner was found guilty, and after judgment a writ of error was brought to remove the record to this court.

Henry L. Clinton, for the plaintiff in error.

The court below erred in charging, "If you (the jury) find that the prisoner was justified in defending himself, and carried that protection further than was necessary for his defense, then he is guilty of manslaughter in some of the four degrees."

William Kelly, a witness for the prosecution, testified that "Lee (deceased) went over to the bar, and was in the act of taking the pitcher, and hitting defendant, when defendant shot him."

Another *William Kelly*, also a witness for the prosecution, testified that he was an eye witness to the homicide, and that "to the best of my (his) opinion, he (deceased) 'hove' the pitcher."

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It should be borne in mind that the principal ground of defense was, that the homicide was justifiable, inasmuch as the prisoner had reasonable ground to believe himself in danger of loss of life, or, in the language of the statute, "of great personal injury." (3 R. S., 939, § 3, sub. 2, 5th ed.) The prisoner was assailed by the deceased with a deadly weapon. Dr. Morton testified that the pitcher was a deadly weapon, and "it would be likely to kill."

In *Shorter v. The People* (2 Comst., 193), it was held by the Court of Appeals, that where one is assailed under such circumstances as to furnish him reasonable ground for apprehending a design to take away his life, or do him some great bodily harm, the law gives the party assailed the right, in his own defense, to slay his assailant, even though, in the language of Justice BRONSON (p. 197), "it may afterwards turn out that the appearances were false, and there was, *in fact*, neither design to do him serious injury, nor danger that it would be done."

This doctrine was reaffirmed by the Court of Appeals, in the case of *The People v. Sullivan* (3 Seld. R., 396). The court, per JOHNSON, J., say: "It was contended on the argument that this charge required the jury to find whether imminent danger *actually* existed, and not merely whether Sullivan *had reasonable ground* to believe that it existed. If this construction of the charge was correct, the case of *Shorter v. The People* (2 Comst. R., 197), *would show it to be erroneous*; but we do not so understand the charge."

It will be perceived that the test is, whether the prisoner "*had reasonable ground to believe*" himself in danger of great bodily harm, or loss of life, and not whether such "danger *actually* existed."

The charge of the city judge, in the case at bar, was directly in violation of the two decisions of the Court of Appeals above cited. The city judge charged, that if the prisoner "carried that protection (self defense) *farther than was necessary* for his defense, then he is (was) guilty of manslaughter," thus charging that unless the danger "*actually*" existed, the prisoner should

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be deprived of his defense, which, if sustained by the evidence (and that was a question of fact for the jury), would entitle him to an acquittal.

A. Oakley Hall (District Attorney), for defendants in error.

The theory of the defense being that the homicide was committed in self defense, the charges of the judge conformed to the law relating to justifiable homicide, as established by the Court of Appeals. (*People v. Shorter*, 2 N. Y. R. [2 Comst.], 193; *Whart. Cr. L.*, §§ 1020, 1021.)

By the Court, CLERKE, J. The exceptions taken by the prisoner's counsel to the evidence are untenable; but I think the exception to the judge's charge is well taken. The language of the charge is: "If you (the jury) find that the prisoner was justified in defending himself, and carried that protection further than was necessary for his defense, then he is guilty of manslaughter in some (meaning some one) of the four degrees." This is a positive and unqualified instruction to the jury on a relevant and important point. I do not find it limited, qualified or explained in any other part of the charge. It tells the jury, in substance, that they have to determine whether, at the time of the fatal blow, the prisoner carried the means of defending himself further than was necessary for his defense. But this is not the question for the jury, but whether the prisoner was assailed under such circumstances as to furnish him reasonable ground for apprehending a design to take away his life. (*See Shorter v. The People*, 2 Comst. R., 193.) The question, I repeat, is, whether the prisoner had reasonable ground to believe himself in danger of great bodily harm or loss of life, and not whether such danger actually existed.

The judgment should be reversed, and a new trial ordered.

BARNARD, J., dissented.

Judgment reversed, and new trial ordered.

SUPREME COURT. New York General Term, March, 1863.
Ingraham, Leonard and Peckham, Justices.

MOSES LOWENBERG, plaintiff in error, v. THE PEOPLE,
defendants in error.

On a trial for murder, a juror was challenged for principal cause, on the ground that he had formed or expressed an opinion as to the guilt or innocence of the prisoner, and it was shown that he had formed an opinion that the person charged to have been murdered, was killed by the prisoner. *Held*, that the challenge was not sustained.

Where, on a trial for murder, a juror was challenged for favor, on the ground that he had formed or expressed an opinion as to the guilt or innocence of the prisoner, the court refused to charge the triers, on the request of the prisoner's counsel, that they should find the challenge true, if, from the evidence, they should find that the juror believed that the person charged to have been murdered, was killed by some one.

On a challenge for favor, the juror testified, before the triers, that he had conscientious scruples in reference to serving as a juror, in a case where the punishment, on conviction, would be death; that he would, if he took an oath to serve as a juror render a verdict in accordance with the evidence, but that it would violate his conscience to do so, and that he could not, where the punishment was death, conscientiously render a verdict which would take a man's life, even if the evidence clearly showed that the prisoner was guilty. The court refused to charge the triers, that assuming what the juror had sworn to be true, no cause was shown which would justify the triers in finding the challenge true.

The prosecution challenged a juror for favor, on the ground that he was not indifferent between the People and the prisoner. The prisoner's counsel demurred to the challenge and assigned for cause that the challenge did not specify any sufficient ground in law, and the district attorney joined in demurrer. *Held*, that the demurrer was not sustainable, and it was overruled.

On such a challenge the juror, when examined as a witness before the triers, was asked, "have you any conscientious scruples against rendering a verdict of guilty, in a case where the punishment, upon conviction, is death?" On objection, held that the question was competent.

Charge of the recorder of the city of New York, in a case of murder committed after the passing of the act of 1860, stating the rules by which the jurors were to discriminate between murder in the first and second degrees, and manslaughter in the third and fourth degrees, and explaining the law of excusable and justifiable homicide.

Where statements, made by the prisoner, have been proved and put in evidence on the part of the prosecution, they are only evidence to be considered in connection with all the other evidence in the case. The prosecution is not bound or concluded by them.

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The good character of a prisoner is always a proper subject for the consideration of a jury; it may be taken into consideration not only in a case where doubt of guilt exists, but it may sometimes, of itself, generate a doubt in the mind of the jury. But where a clear case of guilt is made out on the proof, evidence of good character is of comparatively little importance.

To convict of murder in the first degree, under the act of 1860, it is sufficient if premeditation and deliberation came into existence, with the intent to kill, on the instant of striking the blow by which the death was caused.

Where the term of the Court of General Sessions of the city and county of New York, is continued, under the provisions of the act of 1846 (*Sess. Laws of 1846, p. 4*), beyond the time prescribed by 2 R. S., 217, § 31, by reason of the unfinished trial of a case commenced during the regular term, the court being legally in session, may proceed to pass judgment upon prisoners previously convicted.

The prisoner was convicted and tried before the Court of General Sessions of New York, in December, 1861, for having murdered Samuel Hoffman in November, 1861, and was found guilty of murder in the first degree, and, on the fourth of January, 1862, was sentenced to suffer the punishment of death on Friday, the twentieth day of February, 1863, and to be confined at hard labor in the State prison until such punishment of death should be inflicted. On error to this court, the judgment was affirmed,¹ Justice INGRAHAM dissenting.

Form of a return to a writ of error by the Court of General Sessions of New York, containing writ of error, allowance of writ with stay of proceedings, indictment in a case of murder, necessary entries on the record, statement from minutes of the court, &c., &c.

THIS case comes before the court on writ of error, in the following form :

The People of the State of New York, to the Court of General Sessions of the peace, in and for the city and county of New York, greeting :

Because, in the record and proceedings, and also in the giving judgment upon a certain indictment which [L. s.] was in our said court, before you, against Moses

Lowenberg, for murder, as is said, manifest error has intervened to the great damage of the said Moses Lowenberg, as he complains, and we being willing that the error, if any, should be corrected, and full and speedy justice done to the party aforesaid, in this behalf, do command you, that if judgment be thereupon given, then without delay, you distinctly

¹ NOTE.—See note at the end of this case.

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and openly send, under your seal, the record and proceedings aforesaid, with all things touching or in anywise concerning the same, to our justices of our Supreme Court, at the city hall, in the city of New York, on the first Monday of February, 1862, together with this writ, to the office of the clerk of the city and county of New York, that the record and proceedings aforesaid, being inspected, we may cause to be done thereupon, for correcting that error, what of right ought to be done. And we do further direct, that this writ is to operate as a stay of proceedings on the judgment upon which such writ is brought.

Witness—Hon. GEORGE G. BARNARD, one of the justices of our Supreme Court, this 6th day of January, 1862.

By the Court.

H. W. GENET, *Clerk*.

HENRY L. CLINTON, *Attorney*.

[INDORSED.]

SUPREME COURT.

Moses Lowenberg, plaintiff in error,	}	Writ of error.
v. The People, defendants in error.		

Returnable 1st Monday of February, 1862.

HENRY L. CLINTON, *Attorney*.

I allow the within writ, and I do direct that the same is to operate as a stay of proceedings on the judgment upon which such writ is brought.

WM. H. LEONARD, *Justice*.

Dated New York, January 6th, 1862.

The return to the writ of error was as follows:

The answer of the judges of the Court of General Sessions of the Peace, in and for the city and county of New York, within named, a transcript of the record, whereof mention is within made, with all things touching, or in anywise concerning the same, we certify under the seal of our said court, to the justices of the Supreme Court, within mentioned in a certain schedule to this writ annexed, as within it is commanded.

By the Court,

[L. S.]

HENRY VANDERVOORT, *Clerk*.

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State of New York, city and county of New York, ss :

BE IT REMEMBERED, that at a Court of General Sessions of the Peace, holden at the city hall, of the city of New York, in and for the city and county of New York, on the first Monday of November, in the year of our Lord one thousand eight hundred and sixty-one, before JOHN H. McCUNN, Esq., city judge of the said city of New York, justice of the said court, assigned to keep the peace of the said city and county of New York, and to inquire by the oaths of good and lawful men of the said county, of all crimes and misdemeanors committed or triable in said county, and to hear, determine and punish according to law, all crimes and misdemeanors in the said city and county, done and committed.

By the oath of, &c.

(Here were inserted the names of the grand jurors.)

It was then and there presented as follows, that is to say :

City and county of New York, ss :

The jurors of the People of the State of New York in and for the body of the city and county of New York, upon their oath present :

That Moses Lowenberg, late of the first ward of the city of New York in the county of New York, aforesaid, on the fourteenth day of November, in the year of our Lord, one thousand eight hundred and sixty-one, at the ward, city and county aforesaid, with force and arms, in and upon one Samuel Hoffman, in the peace of the People of the State, then and there being willfully and feloniously, deliberately and premeditatedly, and of his malice aforethought, did make an assault; and, that the said Moses Lowenberg, with a certain knife, which he, the said Moses Lowenberg, in his right hand then and there had, and held him, the said Samuel Hoffman, in and upon the chest of him, the said Samuel Hoffman, then and there willfully, deliberately, premeditatedly, feloniously and of his malice aforethought, did beat, strike, stab, cut and wound, giving unto the said Samuel Hoffman, then and there, with the knife aforesaid, in and upon the chest of him, the said Samuel Hoffman, one mortal wound of the breadth of two

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inches, and of the depth of six inches, of which said mortal wound he, the said Samuel Hoffman, on the day and year aforesaid, at the ward, city and county aforesaid, did die.

And so the jurors aforesaid, upon their oath aforesaid, do say that he, the said Moses Lowenberg, him the said Samuel Hoffman, in the manner and form, and by the means aforesaid, at the ward, city and county aforesaid, on the day and the year aforesaid, willfully, deliberately, premeditatedly, feloniously, and of his malice aforethought, did kill and murder, against the form of the statute in such case made and provided, and against the peace of the People of the State of New York, and their dignity.

The jurors aforesaid, upon their oath aforesaid, do further present, that the said Moses Lowenberg, late of the first ward of the city of New York, in the county of New York, aforesaid, on the fourteenth day of November, in the year of our Lord, one thousand eight hundred and sixty-one, at the ward, city and county aforesaid, with force and arms, in and upon one Samuel Hoffman, in the peace of the People of the State, then and there being, willfully and feloniously, deliberately, premeditatedly and of his malice aforethought, did make an assault; and that the said Moses Lowenberg, with a certain sword, which he, the said Moses Lowenberg, in his right hand then and there had and held, him, the said Samuel Hoffman, in and upon the chest, then and there willfully, deliberately, premeditatedly, feloniously and of his malice aforethought, did strike, beat, stab, cut and wound, giving unto the said Samuel Hoffman then and there, with the sword aforesaid, in and upon the chest of him, the said Samuel Hoffman, one mortal wound, of the breadth of two inches, and of the depth of six inches, of which said mortal wound, he, the said Samuel Hoffman, on the day and in the year aforesaid, at the ward, city and county aforesaid, did die.

And so the jurors aforesaid, upon their oath aforesaid, do say, that he, the said Moses Lowenberg, him, the said Samuel Hoffman, in the manner and form, and by the means aforesaid, at the ward, city and county aforesaid, on the day and the

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year aforesaid, willfully, deliberately, premeditatedly, feloniously and of his malice aforethought, did kill and murder, against the form of the statute in such case made and provided, and against the peace of the People of the State of New York and their dignity.

And the said Moses Lowenberg, afterwards, to wit, on the thirtieth day of November, in the year of our Lord one thousand eight hundred and sixty-one, at the place last mentioned, before the said justice above named, came in his own proper person, and being brought to the bar here in his own proper person, and arraigned upon the said indictment, and having heard the said indictment read, and being asked whether he demanded a trial upon the said indictment, answers that he does require a trial thereon, and says that he is not guilty thereof; and thereupon for good and ill is put upon the country.

And Nelson J. Waterbury, Esq., district attorney for the city and county of New York, who prosecutes for the People of the said State of New York, in their behalf, doth the like.

And afterwards, to wit, at a Court of General Sessions of the peace, held in and for the said city and county of New York, at the city hall of the said city, on the twelfth day of December, in the year of our Lord one thousand eight hundred and sixty-one, before JOHN T. HOFFMAN, recorder of the city of New York, and justice of the said court, comes the said Moses Lowenberg, and the said Nelson J. Waterbury, Esq., district attorney, likewise comes. Therefore, let a jury thereupon immediately come before the justice last above mentioned, of free and lawful men of the said city and county, each of whom hath, &c., by whom the truth of the matter may be better known, and who are not of kin to the said Moses Lowenberg, to recognize upon their oath whether the said Moses Lowenberg be guilty of the murder and felony, in the indictment aforesaid above specified, or not guilty.

And the jurors of the said jury, by John Kelly, Esq., sheriff of the city and county of New York, for this purpose empaneled, and returned, to wit:

Charles D. Horter, Otto H. Kopp, Solomon J. Gowey, Wil-

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liam S. Tarbell, William C. Tallmage, Benjamin R. Conklin, Richard W. Hendrickson, John C. Graham, John Beam, Edward W. Ketcham, James C. Durant, Josiah S. Breese.

Who being called, come; and who being then and there elected, tried and sworn well and truly to try and true deliverance make between the People of the State of New York and the said Moses Lowenberg, then at the bar, whom they should have in charge upon the said indictment, and a true verdict give according to evidence, who, upon their oath aforesaid, say that the said Moses Lowenberg is guilty of the murder in the first degree and felony above charged in the form aforesaid, as by the indictment aforesaid is above alleged against him.

And upon this it is demanded of the said Moses Lowenberg whether he hath or knoweth anything to say wherefore the said justice here ought not, upon the premises and verdict aforesaid, to proceed to judgment against him, who nothing further saith, unless as before he has said. Whereupon all and singular the premises, being seen and by the same justice here fully understood, it is considered by the said justice that the said Moses Lowenberg, for the murder in the first degree and felony aforesaid, whereof he is convicted, do suffer the punishment of death for said murder and felony, on Friday, the twentieth day of February, in the year one thousand eight hundred and sixty-three, and that the said Moses Lowenberg be confined at hard labor in the State prison until such punishment of death shall be inflicted.

Judgment signed this 27th day of January, 1862.

JOHN T. HOFFMAN, *Recorder.*

A. OAKLEY HALL, *District Attorney.*

COURT OF GENERAL SESSIONS OF THE PEACE IN AND FOR
THE CITY AND COUNTY OF NEW YORK.

The People of the State of New York
v.
Moses Lowenberg.

} Statement from the minutes of the
Court.

The December term of the court, in the year 1861, was commenced on Monday, the second day of the month, and was continued by adjournment from day to day, for the trans-

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action of business up to and including Saturday, the fourth day of January, 1862, when the court was adjourned for the term. The trial of the above named defendant, Moses Lowenberg, commenced on the eleventh day of said month of December, 1861, and terminated late in the evening on that day, by the rendition of a verdict of guilty of murder in the first degree.

The trial of Charles M. Jeffards was commenced on the eighteenth day of the same month of December, and was continued from day to day until the twenty-fourth day of the same month, when it was concluded at three-quarters of an hour past ten o'clock in the evening, by a verdict of guilty of murder in the first degree. On the twenty-eighth day of the same month of December, the district attorney moved that judgment be pronounced upon the said Moses Lowenberg, and also upon the said Charles M. Jeffards, and upon the motion of the counsel for the prisoner in each case, the hearing of the said motions was postponed until the thirtieth of the same month. On the thirtieth day of the same month of December, the further hearing of the motions, that judgment be pronounced upon the said Charles M. Jeffards, and also upon the said Moses Lowenberg, was, upon the motion of the counsel for the prisoner in each case, postponed until the fourth day of January, then next ensuing. On the said fourth day of January, in the year 1862, at a Court of General Sessions of the Peace, holden in and for the city and county of New York, before the Hon. JOHN T. HOFFMAN, recorder of the city of New York, justice of the Sessions, on motion of the district attorney, A. O. Hall, Esq., it was ordered that Nelson J. Waterbury, Esq., be substituted as district attorney "Ad hoc," during the proceedings upon this indictment against Moses Lowenberg. Nelson J. Waterbury, Esq., late district attorney, moves for judgment upon the prisoner, according to law. H. L. Clinton and J. T. Brady move in arrest of judgment. Counsel are heard in support of and in opposition thereto. The court overruled the same. The said Moses Lowenberg was then, to wit, on said fourth day of

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January, A. D. 1862, asked what he had to say why judgment of death should not be pronounced against him, according to law, and he having nothing to say further than what he before hath said, the said court thereupon, on said last mentioned day, pronounced sentence as follows, to wit: Whereupon it is ordered and adjudged by the court that the said Moses Lowenberg, for the murder in the first degree and felony aforesaid, whereof he stands convicted (being a crime punishable with death), do suffer the punishment of death for said murder and felony, on Friday, the twentieth day of February, in the year of our Lord one thousand eight hundred and sixty-three, between the hours of ten in the forenoon and two in the afternoon of that day, and it is further ordered and adjudged by the court that the said Moses Lowenberg be confined at hard labor in the State prison until such punishment of death shall be inflicted.

Like proceedings were also had in the case of Charles M. Jeffarda.

HENRY VANDERVOORT, *Clerk*

The defendant was indicted at a Court of General Sessions of the peace, in and for the city and county of New York, on the thirtieth day of November, 1861, for the murder of one Samuel Hoffman, on the fourteenth day of November, 1861. Upon his arraignment on said indictment he pleaded not guilty, and put himself upon the country for trial. The issue joined upon said indictment came on to be tried at said court, on the eleventh day of December, 1861, before Hon. JOHN T. HOFFMAN, recorder of the city and county of New York. After several jurors had been called and challenged for principal cause and to the favor, on the part of the prisoner and set aside, one William E. Devries was called as a juror and appeared, and was challenged for principal cause on the part of the prisoner, on the ground that he had formed or expressed an opinion as to the guilt or innocence of the prisoner, and the challenge denied by the counsel for the People, the said William E. Devries having been sworn to testify the

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truth as to his competency to serve as a juror, testified as follows :

I read of the affair; have no opinion about it; only saw in the paper that Hoffman, the person for the murder of whom the defendant was indicted, had been killed.

Q. Did you believe that to be true?

A. The papers said so; I did believe it to be true that Hoffman had been killed, as far as the paper stated.

Q. Has your opinion undergone any change since you read that statement?

A. My belief has not been changed that Hoffman was killed; I read he had been killed by Doctor Lowenberg, the prisoner; as far as the paper stated, I believed that to be true; my belief has not undergone any change since.

The court thereupon found the challenge not true, to which counsel for defendant then and there duly excepted. The said William E. Devries was then challenged by the defense for favor, which challenge was found to be not true, and he was then by the defense challenged peremptorily.

Solomon J. Goeway was called as a juror and appeared, and was challenged for principal cause, on the ground that he had formed or expressed an opinion as to the guilt or innocence of the prisoner, in reference to the charge on which he was then to be tried, and the challenge was denied by the counsel for the People. The said *Solomon J. Goeway* having been sworn to testify the truth as to his competency to serve as a juror, testified :

I think I read about the case some time ago; I have forgotten all about it; I read that Hoffman had been killed; I believed it to be true; I believed it to be true as much as anything I read in the papers; I think I believed that Hoffman was killed by a man named Lowenberg; I believed that to be true; the challenge was then withdrawn by the defense, and the said *Goeway* was thereupon challenged for favor by the counsel for the prisoner, on the ground that he had formed or expressed an opinion as to the guilt or innocence of the prisoner. The said challenge was denied by the coun-

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sel for the People, and tried by triers duly appointed and sworn, the said Goeway thereupon testified as follows:

I suppose that Hoffman is dead; I do not doubt that he was killed by somebody; I have no opinion as to whether or not he was killed by the prisoner. Counsel for defendant asked the court to charge the triers that they should find the challenge true, if they should find from the evidence of the juror Goeway, that he, the said juror, believed that Hoffman, the deceased, was killed by some one. The court refused so to charge, to which counsel for defendant excepted. The triers found the challenge not true, and the said Solomon J. Goeway was sworn as a juror to try the cause.

Richard Hendrickson was called as a juror, and appeared and was challenged for principal cause on the part of the prisoner, on the ground that he had formed or expressed an opinion as to the guilt or innocence of the prisoner, and the challenge was denied by the counsel for the People. The said Richard Hendrickson, having been sworn to testify the truth as to his competency to serve as a juror, testified as follows:

I have heard of the killing of Hoffman; I had no reason to doubt that he was killed by some one; I believed so then and believe so now. The court overruled the challenge for principal cause, to which counsel for the defendant excepted. The said Richard Hendrickson was thereupon sworn as a juror to try said cause.

Thomas A. Gill was called as a juror and appeared, and was challenged for principal cause on the part of the prisoner, and the challenge denied by the counsel for the People. The said Thomas A. Gill having been sworn to testify the truth as to his competency to serve as a juror, testified that he had not formed or expressed any opinion as to the guilt or innocence of the accused, whereupon the challenge was overruled, and the district attorney thereupon challenged the said Thomas A. Gill for favor. The said Gill thereupon testified as follows:

I have conscientious scruples in reference to serving as a juror in a case where the punishment, upon conviction, would

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be death. On his cross-examination by the prisoner's counsel, the said Gill testified as follows :

I would, if I took an oath to serve as a juror, render a verdict in accordance with the evidence. Being examined by the district attorney, the said Gill further testified as follows :

It would violate my conscience to do so ; I could not conscientiously render a verdict that would take a man's life, under any circumstances ; I could not, where the punishment was death, even if the evidence clearly showed that the prisoner was guilty. Counsel for the prisoner requested the court to charge the triers, that assuming the said testimony of the said Gill to be in every respect true, no cause was shown which would justify the triers in finding the challenge true. The court refused so to charge, to which counsel for the defendant excepted.

James C. Durant was called as a juror and appeared, and was challenged for principal cause on the part of the prisoner, on the ground that he had formed or expressed an opinion as to the guilt or innocence of the prisoner, and the challenge was denied by the counsel for the People. The said James C. Durant having been sworn to testify to the truth as to his competency to serve as a juror, testified as follows :

I saw the case in the papers ; I read that Hoffman had been killed by, I believe, Dr. Lowenberg ; I had no reason to doubt the truth of the account ; I believed it as far as the papers go, and I believe it now.

Cross-examined by the district attorney : I have no opinion as to whether Dr. Lowenberg killed deceased or not ; I never expressed any opinion on the subject, to my knowledge, in my life.

Re-examined by counsel for defendant : I do not know that I intend to modify or change the evidence given by me on my direct examination ; I think there is a distinction between an opinion and my belief ; but I do not know that I can state it ; I believed it because I read it, and formed an opinion that it was so because I never saw it contradicted.

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Recross-examination by district attorney :

I never expressed to any one, any opinion or belief as to the guilt or innocence of the defendant. The court overruled the said challenge for principal cause, to which counsel for defendant excepted. The said James C. Durant was then sworn as a juror to try the cause.

Otto H. Kopp was then called as a juror and appeared, and was challenged for principal cause by the counsel for the defendant, on the ground that he had formed or expressed an opinion as to the guilt or innocence of the prisoner, and the challenge was denied by the counsel for the People. The said *Otto H. Kopp* having been sworn to testify the truth as to his competency to serve as a juror, testified that he had not formed or expressed any opinion as to the guilt or innocence of the prisoner. Whereupon, the challenge for principal cause was withdrawn, and the district attorney, thereupon, challenged the said *Otto H. Kopp* for favor, on the ground that the said *Kopp* was not indifferent between the People and the prisoner. Counsel for defendant demurred to said challenge, and assigned for cause, that the said challenge did not specify any sufficient ground in law. The district attorney joined in demurrer; whereupon the court overruled said demurrer, to which decision counsel for defendant excepted. The district attorney thereupon asked the said *Otto H. Kopp* the following question: Have you any conscientious scruples against rendering a verdict of guilty, in a case where the punishment, upon conviction, is death? Counsel for defendant objected to this question. The court overruled the objection, and allowed the question to be answered; to which decision counsel for defendant excepted. The said *Kopp* thereupon answered that he had not. The district attorney thereupon withdrew said challenge, and the said *Kopp* was sworn as juror to try the cause.

William S. Tarbell was called as a juror and appeared, and was challenged for principal cause on the part of the defendant, on the ground that he had formed or expressed an opinion as to the guilt or innocence of the prisoner, and the challenge

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was denied by the counsel for the People. The said William S. Tarbell having been sworn to testify the truth as to his competency to serve as a juror, testified that he had not formed or expressed an opinion as to the guilt or innocence of the accused, whereupon the challenge was withdrawn, and he was challenged by the defense for favor, and testified that he had no prejudice against a Jew or an Israelite, whereupon the latter challenge was also withdrawn. The district attorney thereupon challenged the said Tarbell for favor, on the ground that he was not indifferent between the People and the prisoner. Counsel for defendant demurred to said challenge for favor. The district attorney joined in demurrer. The court overruled the demurrer; to which counsel for defendant excepted. The witness thereupon testified that he had no conscientious scruples where the punishment was death. The district attorney thereupon withdrew the challenge, and the said William S. Tarbell was sworn as a juror to try the cause.

Silas A. Allen was called as a juror, and was challenged by the defense, for principal cause, and after he had been sworn and examined, the said challenge was withdrawn. The said Allen was then challenged for favor, on the part of the district attorney, on the ground that he was not indifferent between the People and the prisoner. The counsel for the prisoner demurred thereto, and the court overruled the demurrer, to which counsel for defendant excepted. Said Allen thereupon testified that he had no conscientious scruples against rendering a verdict of guilty, in a case where, upon conviction, the punishment was death, and the challenge was then withdrawn. The said Allen was thereupon peremptorily challenged by the counsel for defendant.

M. P. Dutton was called as a juror, and appeared, and was challenged by the defense for principal cause, which challenge, after he had been sworn and examined, was withdrawn, and he was also challenged by defense for favor, which challenge was also withdrawn. The district attorney thereupon interposed a challenge to the said juror (Dutton), for favor, on the ground that he was not indifferent between the prisoner and

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the People. The counsel for the prisoner demurred thereto, because there was no further specification of the grounds of challenge, and the court overruled the demurrer, to which counsel for defendant excepted. The witness thereupon, upon the examination of the district attorney on said challenge, gave testimony, and the challenge was withdrawn, whereupon counsel for prisoner challenged the juror peremptorily.

After the jury had been empaneled, and the cause opened to the jury by the district attorney, *Mrs. Elizabeth Hoffman* was called as a witness on behalf of the prosecution, and being duly sworn, testified as follows:

I live at 141 First avenue; my husband died Thursday, November 14th, last, in my room, on a bed, at 141 First avenue; I know the defendant personally since May, this year; he lived at 141 First avenue; defendant occupied the front basement, and we lived in the rear basement; as far as I know, the defendant lived there; he had only the one room; I occupied the rear room and a room for residence in the rear house; we slept in the rear house; we had a little bed in the basement where my brother slept; I did not see defendant the evening before my husband died; night before deceased died I did not see defendant come in; I heard him come into his room; after that I saw the defendant when he did the deed; I was out; I saw him when I came in; I shut the door when I came in; he came out of his door towards me; this was about eight o'clock in the morning; I shut the door, and the defendant opened the door and slammed it back (I mean the front basement hall door); I then went in my room; I was then occupied in getting my washing ready, and had to go out and in; the draft from the front door was too much for me; then I went slowly and softly, in order not to disturb the doctor (defendant) and shut the door again slowly; as I returned to my room and passed his door, he came out of his room the second time, and slammed the hall door back again; talked a few words; I paid no attention to it, because I was not excited; when I went out the second time, the doctor's room door was open about a foot, on ajar; I could see him plainly

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in his room; I tried to go to my work again, and was in and out, as I had to wash before the rear door; my room door was open, and I had to go in and out to prepare for washing; my husband was in the rear room occupied with the child; the draft was too much; and then my husband went out and saw that the draft was too strong, and he went and wanted to shut the door; I saw him, and was going after him, but he had already passed the doctor's door, and my husband wanted to take hold of the handle of the door with his left hand, when the doctor came out, not fully dressed, with his pantaloons on and a white shirt, and, if I do not err, a black vest, and went quickly, with brisk paces, towards the door, his right hand laying against his side, having some object in his hand, and took hold of the door with his left hand, as if he wanted the door open; my husband said, "Let the door be closed," or "the door must be closed; let now the door be closed;" and as he spoke thus, the doctor already stabbed him into his left side; my husband let the door slip, and seized hold of his own breast with both hands; he was then turning his back somewhat towards me, and came quickly towards me, and I stepped a step forward, and he said, "God! I am stabbed; he has stabbed me;" then we went into our room, and I asked him, "Is it hard?" (I meant if he was badly stabbed); my husband said, "Yes, yes, the blood is already running inside;" I went to Ninth street to get Dr. Klein, and when I came back my husband was dead; he might have still lived a little; I had been gone about six minutes; afterwards a physician (Dr. Schwartzenberg) came a little while after the stabbing occurred; I can't tell the time; the people told me my husband was already dead. The district attorney asked the witness the following questions:

Q. Do you know who locked the door the night before?

A. My husband did.

Q. Did you see him lock it?

A. No; I saw him go out with a light, and I heard him lock the door.

Q. Did you hear the defendant say anything at that time?

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Counsel for defendant objected to this question. The court overruled the objection and allowed the question to be answered, to which decision counsel for defendant excepted. The witness then answered, no, neither he nor my husband said anything; when prisoner made motions to my husband, I saw him make more than two; after deceased was stabbed, I immediately returned to defendant's door, and said, "you, fellow, thou hast stabbed my husband;" he replied, "yes, yes;" then I screamed, "Miss Smith, my husband is stabbed;" the doctor said something else at the time, which I could not understand; I was too much excited; in my opinion, as much as I can think, he said something like, "he ought to have left the door open," or something of that kind; I don't remember anything else; no one else was present but I, deceased and prisoner; I saw something in defendant's right hand, of that length (about a foot); it did not look very dark nor very bright; I saw something bright behind the hand.

Cross-examined by counsel for defendant. I am certain as to the time; it was near eight o'clock, not later or earlier; the sun did not shine that morning; it was a dark morning; there is a small glass window running down on one side of the door; the deceased stood with his right side toward the window, the light somewhat toward his back; this window is not quite a quarter of a yard wide; it runs from the knob of the door up to the top of the door; it was, perhaps, very dirty; I had not cleaned it for a long time; I cannot say if the rear door was shut or not; we most always kept the rear door shut; we went in and out of the rear door; the back door was not always open or shut; we kept it shut as much as possible; there is not another door leading to the street, or a back way; the defendant's room was on the right side of hall going out; same side as my room; from the time I first shut the door, to the time deceased was stabbed, it was, perhaps, half an hour; I can't tell; I paid no attention to the time; it was a half or three-quarters of an hour, not an hour; I first shut the door about half-past seven; somewhere about that time, perhaps later; I saw my husband go out to shut the front door; he

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passed me; I stood near my door, a foot or two from it; as soon as he passed out the door about two paces, I followed him; he did not go rapidly; he went his ordinary pace; as soon as he started, I did not try to overtake him, nor at any time; after my husband went to the front door, I did not go to the front door; when he was stabbed, I was, perhaps, one pace from my door, and was looking toward the front door; I did not follow my husband; from my door to the front basement door, is about as far as from here to the stove (about thirty-five feet); when the defendant went to his room after stabbing my husband, I stood in the same place; I can't say if the rear door was open or shut at the time; my husband had closed the door when he was stabbed; it was dark; as defendant came out of his room, door was not quite shut; my husband was in the act of shutting it; I saw defendant's side face, left side; I could only see his left side, but, as he turned, I perceived the object; he held his left hand down in the act of seizing something; I did not see his left hand up; I saw his left hand; there was nothing in it; nothing to draw my attention to his left hand; I had no idea of anything wrong; there was nothing to attract my attention except his (defendant's) coming out; when he came out the door, it struck me he had his right hand leaning against his right side; it was not free; his arm was a little turned; when he came out he went right to the front door; from doctor's door to front door, was about as far as from here to that door (about ten feet); he went in a very quick pace, not running; I saw the deceased pass doctor's door on his way to the front door; doctor was not out; the handle to the front door is on right side of door going out, same side as doctor's room; as the doctor came out of the door, I saw the deceased had hold of the front door with his left hand, closing it; as doctor reached the front door, the first I observed, the doctor took hold of the front door and wanted to push it back: I can't tell if he took hold of the edge of the door with his left hand; he turned a little, and, as he did so, he moved his right hand; my husband stood nearest the door; the exact words deceased used were,

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"now let the door be closed;" he spoke in a loud voice; he spoke loud usually; I heard it; I saw no blows struck; I saw the motion of the defendant's hand more than once, certainly twice, it may have been three times; then my husband turned, and I saw that the doctor stood with his back toward the door, and my husband was coming back; I did not see them (defendant and the deceased) grappling; I did not see if either of them had hold of each other; they did not take hold of each other; I could see clearly and distinctly if they did or did not.

Q. Did you swear before the coroner that it was somewhat dark in the hall, and you could not see very distinctly?

A. Yes; I said so; it was somewhat dark, but I could see, but not very distinctly; when I said to doctor that he stabbed my husband, he said, "he ought to have left me alone, or he ought to have staid away;" I cannot tell the words he used; he said he should have let me alone, or some such expression; defendant did not say to me, "he ought to have let go of me." Did you swear before the coroner that at this time the doctor said, "he ought to have let go of me," or, "he ought to have let me alone?"

A. No; I cannot remember.

[The district attorney admitted that she so swore before the coroner.]

The defendant generally had a cane when he went out; I paid attention to that; after deceased was stabbed, I did not look on the floor for anything; I don't know where that cane is; I have not seen it since; I could not say what it was the doctor had in his hand; I could not see any color to it; I cannot say it was bright or dull; I saw something behind his hand; I could have seen it if it was like that (a cane shown to witness); when defendant was turning, I saw something about so long; I could not say it was bright, dull, or what color; at that time I had no idea as to what it was; after I shut the door the first or second time, I told my husband that the doctor had opened the door again; I only told him once that the doctor had slammed it open; I said to my husband,

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"now, look, there he is slamming the door open again;" my husband said nothing; he was not angry; I don't recollect anything he said; he said nothing; I don't remember if I said anything else to my husband before he went out; he went out in a minute or two after; I shut the door that morning twice; three or four minutes elapsed between the first and second time; I cannot tell how long it was from time I shut it to time my husband shut it; it was five or six minutes—perhaps longer.

Q. When you told your husband that defendant had shut the door, did your husband say, "does he want to tantalize us all the time; now I am going to shut the door myself?"

A. He said, "now I am going to shut the door!" I cannot remember if he said, "does he want to tantalize us all the time;" when my husband said he was going to close the door, I said, "wait, I will tell the landlord first;" the deceased was at the door then; when my husband came back, he came on the same side where our rooms are; at the front door the defendant was towards the door; the deceased was very near the doctor's door at the time.

Dr. George Swartzenberg was called as a witness on behalf of the prosecution, and, after being duly sworn, testified as follows:

I was called to see the deceased; got to 141 First avenue, between eight and 9 o'clock; I found him dead; I examined the wounds on him.

George B. Bouton was next called as a witness on behalf of the prosecution, and after being duly sworn, testified as follows:

I am a physician; I made a *post mortem* examination of the deceased; I found three stab wounds, one an inch above the right nipple, one an inch and a half from the left of the medium line opposite the spine, between the third and fourth rib, and about one and a half inches obliquely, extending upwards and outwards, from the left nipple; the first wound perforated one of the ribs, but did not injure the lung; the second wound passed through the pericardium and the ascend-

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ing aorta, and ending by the side of the vertebral column; the third was merely muscular, about one a half inches deep, and in the tissues; it was of no consequence; it was one and a half inches upwards and outwards from the left nipple; I found hemorrhage from the second wound had been great, and death was occasioned by it; the second wound, in the order of description as I have given it; I examined the organs; there was some adhesion of lungs, and tubercular deposits of the left lung; all the other organs were healthy.

Cross-examination by counsel for defendant: The tubercular deposits were indicative of consumption; these wounds would have been produced by a small cane like this; the first wound was one inch in depth, the second six inches in depth, and the third about two inches in depth; the second wound produced death; the third wound could have been made as quick as thought, almost; there was nothing in the wounds to indicate the time occupied in inflicting them.

John McDermott was then called as a witness on behalf of the prosecution, and, after being sworn, testified as follows: I am a police officer, attached to the 17th precinct; I first heard of this murder on the morning of the 14th November last; I went to No. 141 First avenue; I inquired who was murdered; I found the prisoner and brought him to the station house, and I asked him if he stabbed the deceased; he said it was my business to find out, or something to that effect; I searched him, and asked him what he done with the weapon he stabbed the man with; he said he had no weapon; he wanted to know if he could not get out on bail; I told him no, I did not suppose he could, that it would be brought before the grand jury; I asked him why he killed the man; he said he had not; I said, you must have killed him; he said I had no right to call him a murderer; I said, from the circumstances I did not hesitate in saying that he murdered the man; I was about to take him down stairs; he asked me to go for bail; he said Collector Barney would go bail for him; he said, "I am a gentleman," and that I had no right to call him a murderer; he said if he had left the front door closed, that nothing of the

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kind would have occurred ; the prisoner said, had he (deceased) left the door open it would not have occurred ; I asked him if shutting and opening the door caused the quarrel ; he said that was the cause of the occurrence ; I said, you must go down to the cell ; he then took off his hat and said he was struck by this man Hoffman and abused, and what he did was in self defense ; he said deceased had struck him in the face ; I examined him ; found no marks, except that the skin was in the least bit ruffled over the left eye, so you could take notice of it on close examination ; he asked me if he had not a right to defend himself, when assaulted ; I told him the police headquarters was the place, and not to take the life of an assailant at so frivolous an offense as that ; I then took him down stairs ; I locked him up in a cell ; I then returned to 141 First avenue, and there found this cane sword ; it was the only sharp instrument I found, except an old table knife ; when I brought him to the station house, I examined him to find blood ; I found a stain of blood under the finger nail of the forefinger and thumb of his left hand ; no other stain.

Cross-examined by counsel for defendant: I found that cane sword on a table in the prisoner's room ; I saw no cane about there ; I made a thorough search through the hall and in the doctor's room — no other room ; I looked on the hall floor ; I lit a candle and looked ; I went to make the search about half past eight o'clock ; prisoner asked me to try to find the cane part of the sword ; I also looked in deceased's room ; I just glanced around ; the mark on defendant was on forehead, about the size of the end of your finger ; the skin was a little ruffled and red ; I examined no further ; I did not feel of his head to see if it was bruised ; defendant said, had not a man a right to defend himself against an assailant ; I swore before the coroner that defendant said he did it in self defense — that deceased assaulted him ; he said, what he did he did in self defense ; I told him I had no hesitation in calling him a murderer and saying he murdered the man ; when I asked him, and he said it was my business to find out, I plied him with questions as to what he had done, and why, and with what he had done it ;

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I made the arrest at eight o'clock and fifteen minutes ; I searched the defendant, and found on him a watch, a port monnaie and two bank books.

Redirect examination by district attorney: The mark on his forehead might possibly have been produced by a hat, but it is not probable ; it was a round mark, not such a mark as a hat produces ; there was no blood on the weapon I found.

Recross-examined: The sword is in the same condition now as it was then.

The prosecution here rested their case.

Rev. Samuel M. Isaacs was then called as a witness on behalf of the defense, and testified as follows : I am a clergyman, of the Jewish persuasion ; I have known the defendant about five years ; during that time I have known him by his bringing to me sums of money for the poor ; I did not know his name ; he would not give his name ; in that way I became acquainted with him ; I only know his character from observations I heard other people make within six months ; so far as I know, his character for peace and quietness is good.

Mrs. Barney was then called as a witness on behalf of the defense, and testified as follows : I am the wife of Hiram Barney, collector of the port of New York ; I have known the defendant since about two years ; he was a private tutor in my family about two years ago ; he taught one winter, and one month this fall, and last November about ten days ; as far as I know, I considered him a peaceful and gentlemanly person ; I have heard him spoken of as a remarkably peaceable and quiet man.

Matthew Morgan was called as a witness on behalf of the defense, and testified as follows : I have known the defendant about three years ; he was a tutor in my family two winters ; as to his character, I never knew anything against it ; he was very kind in his treatment to others ; he taught Greek, Latin and German in my family.

Cross-examination: I never heard his character called in question.

Henry Smith was next called as witness on behalf of the

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defense, and testified as follows: I am a physician; I have known defendant about four years and a half; he was introduced to me as a teacher of German; he taught me the German language, from four and a half years since until now; I have known him the greater part of the time; as far as I know and have heard, his character for peace and quietness has been good.

Cross-examination by district attorney: I only know his character from personal observation.

Redirect examination: I met him every morning for one hour, and at other times, at Astor Library.

Abraham Sweet was next called as a witness for the defense, and testified as follows: I am employed in the New York post-office; I have known the defendant ten years; have seen him occasionally for the last four or five years; I knew him in Poughkeepsie; he was then a professor, or teacher; at that time I had occasion to inquire as to his character; it was good as to peace and quietness; his character was that of a very quiet man; as far as I know, it has been so since.

Cross-examined by district attorney: Since he has been here, I have no knowledge as to his character.

William H. Franklin was next called as a witness on behalf of the defense, and testified as follows: I am a member of the firm of Hasbrouck & Co.; I have known the defendant four or five years; I employed him as German tutor; I employed him nine or ten months; I have known him since, and have occasionally met him and those with whom he is acquainted; I know two or three gentlemen with whom he is acquainted; I have always considered him a quiet and peaceable man.

Cross-examined by district attorney: He was introduced to me; I never heard his character questioned.

E. P. Fowler was a witness on behalf of the defense, testified as follows: I am a physician; I have known defendant six to seven years; his character for peace and quietness was good; he seemed always to be peaceable.

Edwin M. Kellogg was called as a witness on behalf of the defense, and testified as follows: I am a physician; I have

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known defendant four and a half years; I became acquainted with him as a teacher; I have known nothing against him; my acquaintance with him has always been pleasant; his character is good.

Gustave Sellin was next called as a witness on behalf of the defense, and testified as follows: I have known defendant twelve years; I first knew him in Cincinnati, Ohio; he was a physician there; he was my physician; I was very intimate with him; I knew them that were acquainted with him; his character for peace and quietness was very good.

Adam Gulich was next sworn as a witness on behalf of the defense, and testified that he kept a boarding house, 79 Bowery; knew defendant three years; knew him as a quiet, sober man — very peaceable and quiet, from what he saw of him.

Alexander Marcus was next called as a witness for the defense, and testified as follows: I am in the segar business; I knew defendant four or five years; saw him almost every day; his character was that of a very peaceable, quiet man.

The defense here rested the case.

Mrs. Catharine Herloch was then called as a witness on behalf of the prosecution, and testified as follows: I know the defendant about two years; I leased him a room at 48 Marion street, a front basement in my house; I have heard people speak of him; I know his character from that — that he was always quarreling with the tenants in the house; he was not a man of violence, that I know of; I don't know anything as to his temper; I don't know anything more.

Cross-examined by counsel for defense: I kept a poultry stand in a market; I never knew defendant to strike any one; he struck my children; I did not see him; he struck me.

Redirect examination by district attorney: He threatened to kill my son.

Recross-examined by counsel for defendant: I did not strike him; I heard him threaten to kill my son; he said, "I'll kill that damned boy;" he did not strike him; there was no dispute between him and me about my children blackguarding

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him and throwing pails and baskets at him, or placing fish in front of his door.

Redirect examination by district attorney: My son is sixteen years old; I never saw defendant use a sword-cane; he had a cane.

The testimony on both sides was here closed.

Counsel for the defense and prosecution respectively summed up the case to the jury.

The counsel for the defense requested the court to charge the jury that unless the killing of deceased, by the prisoner, was willful, deliberate and premeditated, the jury should not convict the prisoner of murder in any degree.

The court refused so to charge, and the counsel for defense excepted.

In respect to this proposition, the court charged the jury that the same was true as to murder in the first degree, but not as to murder in the second degree. But as to murder in the second degree, the court charged as hereinafter stated, and to so much of the charge as related to murder in the second degree, the counsel for the defense excepted.

The counsel for defense requested the court to charge the jury that an intent to take life, formed at the instant the fatal blow is struck, is not sufficient to constitute murder, unless such intent be willful, deliberate and premeditated. The court refused to charge in these words, and counsel for defense excepted.

In respect to this proposition, the court charged the jury as hereinafter stated, and the counsel for defense excepted.

The counsel for defense requested the court to charge the jury that, if the jury believed from the evidence in this case that the prisoner, at the time of the infliction of the stabs, by him, upon the deceased, did not entertain a premeditated intent to kill, they should not convict him of murder.

The court refused so to charge and the counsel for defense excepted.

In respect to this proposition, the court charged the jury that it was true as to murder in the first degree; and as to

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murder in the second degree, the court charged as hereinafter stated, and to so much of the charge as related thereto, the counsel for defense excepted.

The counsel for defense requested the court to charge the jury that, if the jury believed, from the evidence, that the prisoner intended only to inflict upon the deceased, bodily harm, without any intention to take the life of the deceased, they ought not to convict him of murder in the second degree. The court refused so to charge, and defendant's counsel excepted. In respect to this proposition, the court charged the jury as hereinafter stated, that, if the blow was with a dangerous weapon, and the intent malicious and death resulted, it would be murder in the second degree, unless done in the heat of passion, upon sufficient provocation. To which counsel for defendant excepted.

The counsel for defense requested the court to charge the jury, that if the prisoner was only guilty of the involuntary killing of deceased by means of a sword-cane in the heat of passion, the jury should not convict of any higher offense than manslaughter in the fourth degree.

The court refused so to charge, and the defendant's counsel excepted.

In respect to this proposition, the court charged the jury that if the weapon used was a dangerous weapon, they might convict of a higher degree of manslaughter than the fourth; and to this portion of said charge, the counsel for the defense excepted.

The counsel for defense requested the court to charge the jury, that if the prisoner is proven, by the evidence, to have been guilty of killing the deceased, in the heat of passion, by a sword-cane, without a premeditated design to effect death, the jury should not convict of any higher degree than manslaughter in the third degree.

Upon this proposition the court charged as hereinafter stated, and refused to charge otherwise.

The counsel for defense excepted to such refusal, and also

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excepted to so much of said charge as related to manslaughter in the third degree.

The court charged the jury at length, as follows, viz. :

Gentlemen of the jury: The prisoner at the bar, Moses Lowenberg, stands indicted for murder in the first degree. The taking of human life, under any circumstances, is a terrible thing—the taking it with malice and design is very terrible, indeed. Your duty as jurors is a solemn and responsible one, and the close attention you have given to the details of this case, assures me that you find it to be so.

It is proper that in the outset of my charge I should briefly review the evidence in the case. When I have done that, and instructed you upon the law, you will do your duty without regard to the consequences which may ensue. Moses Lowenberg is charged with the murder of Hoffman, on the 14th day of November, 1861. It seems from the evidence that they lived in the same house, 141 First avenue. The prisoner occupying the front basement room, and Hoffman and his wife the rear basement rooms. The location of these rooms, as well as of the rear hall door and door leading to the street, you understand perfectly from the explanations given. Mrs. Hoffman states that on the morning of the 14th of November, she went out of her room, through the hall, and closed the street door, which had been open; that immediately after she had closed it, the prisoner came out of his room and opened it again, slamming it back; that in a few minutes she went and closed it again; that the prisoner again came out of his room and threw it open. As she passed the second time to close the door, the prisoner's door was ajar, and she saw him sitting in his room. A few minutes elapsed between the shutting of the door the first and second times. After the lapse of some minutes from the second time (she thinks five or six minutes, but is not certain), her husband said, I will go and close the door. She said to him, "No, wait and I will see the landlady about it." She adds that as she said this her husband was already out; I saw him go toward the door; he had his left hand upon the door to close it, when the prisoner came

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out of the room, having some object in his right hand; she could not see what it was, nor could she tell the color. There has been some difference between prisoner's counsel and the district attorney, as to what she did say about seeing "something bright." In the latter part of her direct examination, she said, as appears by my minutes, "I saw some article about a foot and a half long; it did not look very bright or very dark; I saw something bright behind the hand; it was dark near the door, and I could not see well."

She says her husband had his hand on the door to close it. The prisoner also put his hand on the door, and the next thing she saw was a motion of the prisoner's right hand, thus (illustrating), and her husband starting back, throwing both his hands upon his breast, told her he was stabbed. He went into their room. She asked him if he was stabbed hard. He said "yes, the blood is now running inside," referring, I suppose, to what the doctor called internal hemorrhage. Such, gentlemen, is her simple statement.

On her cross-examination, she was asked a great many questions, having reference mainly to the degree of darkness which pervaded the hall, and as to whether she could or could not see distinctly. You have heard all her testimony, and will judge for yourselves whether she could or could not see what transpired, and it will be an easy matter for you, on all the evidence in the case, to determine whether the prisoner had in his hand this sword-cane, whether he stabbed the deceased with it, and whether death was the consequence of the wound.

A number of questions were put to Mrs. Hoffman for the purpose of ascertaining from her whether there was any grappling in the hall, any seizing hold of each other by the two men. She says she did not see any, and that if there had been she could have seen it. Now, there is no evidence of any wound having been inflicted by the deceased upon the prisoner, unless it be the mark upon the prisoner's forehead, to which he called the attention of the officer when he was arrested, and in connection with which prisoner stated that

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what he did was in self defense, and that he was assaulted. I do not recollect any other evidence upon this point; if there is, you will recollect it, and the prisoner's counsel can now call attention to it.

Now, if the prisoner did have the sword-cane, if he took it from his room into the hall, if while there he stabbed Hoffman with the sword, and from the wound Hoffman died, are there any other facts proven which show the act to be excusable or justifiable, or which would reduce the killing to manslaughter? If there are no such facts, and the intent to take life existed, it is under the law, as I shall explain it to you, murder. The facts in the case are few and easily got at. There is but one living witness who saw the whole transaction, and she has given to you her statement, and it is for you to determine the degree of consideration to which it is entitled. You will, of course, gentlemen, bear in mind the prisoner's own statements in respect to the facts which occurred. They are before you, and are evidence in the case. The prisoner's counsel has requested me to charge you, that inasmuch as the prosecution have drawn out these statements, that it is bound and concluded by them. This is not so. They are evidence, and are to be considered in connection with all the other evidence in the case, and it is for you to determine which is true, the prisoner's statement or those of Mrs. Hoffman. I will make no further reference to the evidence, except such as bears upon the question of character.

You have heard witnesses on part of the prisoner testify that they knew him as a peaceable and quiet man. You have also heard one of them, a woman, say that he was quarrelsome, had struck her children, had struck her, and threatened to kill her son. The good character of a prisoner is always a proper subject for the consideration of a jury, and is to be taken into consideration, not only in case where doubt of guilt exists, but it may sometimes of itself generate a doubt in the mind of the jury. This is what prisoner's counsel has requested me to charge, and I charge the proposition as fully as he requests. But, gentlemen, you will perceive at once

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that where a clear case of guilt is made out on the proof, evidence of good character is of comparatively little importance. Having thus reviewed the evidence in this case, I will explain to you the law applicable to the facts proven.

The taking of human life, with premeditated design and with malice, is murder; such is the common law definition, and about the briefest one I can give you. The legislature of this State, by the law of 1860, divided murder into two degrees. It declared "that all murder which should be perpetrated by means of poison, or by lying in wait, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration, or the attempt to perpetrate, any arson, rape, robbery or burglary, or in attempt to escape from imprisonment, shall be deemed murder in the first degree, and all other kinds of murder shall be deemed murder in the second degree; and it is made the duty of the jury, if they find a man guilty, to specify in the verdict whether it is of murder in the first or second degree.

This law is pretty nearly, if not exactly, a transcript of the Pennsylvania statute. The courts in that State, in construing the law, have held that there could be no murder in the first degree (except in the cases particularly specified in this act), unless there was the specific intention to kill. They have held that where there is malice and a willful, deliberate and premeditated intent to take life, and death ensues, it is murder in the first degree, but if the intent is not to kill, but to do bodily harm merely, and death ensues, it would be only murder in the second degree. In this case, the district attorney, construing the law of 1860 in its most liberal aspect, has claimed and stated it to be, that to constitute murder in the first degree, there must be some deliberation and premeditation preceding the act, that the mere striking of a blow, with intent to kill, is not sufficient, unless it is done after some deliberation, and if that is lacking, though the intent to kill exists, it is only murder in the second degree.

But, gentlemen, if you find that premeditation and delibera-

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tion existed, it is of no consequence how long it may have preceded the fatal blow. It is sufficient if it came into existence with the intent to kill on the instant of striking the blow. But, though there is the intent to kill, if you are satisfied the mind did not deliberate, then it can only be murder in the second degree. I say if there is an absence of deliberation, if there is merely the intent to kill, formed on the instant, it would be murder in the second degree. I charge the law in this way because it is all the prosecution asks. It is not as strict as laid down by the court of Pennsylvania, and not as strict as I would charge if the district attorney had asked it.

Upon this point the counsel for the prisoner has requested me to charge, that unless the killing of the deceased by the prisoner was willful, deliberate and premeditated, the jury should not convict the prisoner of murder in any degree, and that the intent to take life, formed at the instant the fatal blow is struck, is not sufficient to constitute murder, unless such intent be willful, deliberate and premeditated. These propositions, as stated by the counsel for the prisoner, are not correct, because, as you perceive, they claim, that except as therein stated, there can be no conviction for *murder in any degree*. I have explained to you what the law is upon this subject, and it is unnecessary for me to repeat what I have said. Now, all homicide which is not excusable or justifiable, is, under our statute, either murder in the first or second degree, or manslaughter in some of the degrees. Let us first see whether, under any view of this evidence, this is a case of either excusable or justifiable homicide. There is a distinction between the two, and I do not know that the prisoner's counsel claims that this case is under either of the statutory definitions of excusable homicide. Homicide is excusable:

First. When committed by accident and misfortune in lawfully correcting a child or servant, or doing any other lawful act by lawful means, with usual and ordinary caution, and without any unlawful intent.

Second. By accident and misfortune in the heat of passion,

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upon any sudden and sufficient provocation, or upon a sudden combat, without any undue advantage being taken, and without any dangerous weapon being used, and not done in a cruel and unusual manner.

It cannot be claimed that this case comes under this subdivision. It is conceded that the weapon used was a sword-cane, and I need not say that it can hardly be denied that such a weapon is a dangerous one to plunge into a vital part.

Homicide is justifiable under our statute in the following cases: (The judge here read the statute relating to justifiable homicide.) It is not claimed that the deceased, Hoffman, was attempting to murder the prisoner, or to commit any felony. But prisoner's counsel refers to the prisoner's own statement to the policeman, that what he did was in self defense. The courts in this State have laid down this rule, viz., that one who is without fault himself, when attacked by another, may kill his assailant, if the circumstances be such as to furnish reasonable grounds for apprehending a design to take away his life, or do him some great bodily harm, and there is reasonable ground for believing the danger imminent that such design would be accomplished, although it may afterward turn out that the appearances were false, and there was, in fact, no such design, nor any danger that it would be accomplished.

Before you can find this homicide to be justifiable, on the ground that it was committed in self defense, you must therefore find, that prisoner being without fault himself, was attacked by Hoffman under such circumstances as to furnish reasonable grounds for apprehending a design to take his life, or do him some great bodily harm, &c. It is for you, gentlemen, to say whether there is any evidence to show such a state of facts; if there is, you are bound to give it consideration. The courts have said that a blow with a naked hand does not justify one in returning the blow with a dangerous weapon; and if you find Hoffman did strike prisoner with his hand, it would not justify prisoner in returning the blow with the sword-cane, where there was no reason to apprehend any danger. There

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is no evidence to show that Hoffman was armed. Nor is there evidence to show the comparative strength and power of the two men. Having defined to you the law of murder, and explained to you what homicide is excusable, and what is justifiable, I will instruct you upon the law of manslaughter, so far as it can have any possible bearing in this case. I need not define to you manslaughter in the first and second degrees, it being conceded that this cannot be either one or the other.

The prisoner's counsel has urged that this case may be one of manslaughter in the third or fourth degree. The statute relating to manslaughter in the third degree, so far as it can by any possibility have any application to this case, is as follows, viz.: "The killing of another in the heat of passion, without a design to effect death, by a dangerous weapon, in any case except such where the killing is declared to be justifiable or excusable, shall be deemed manslaughter in the third degree." There must, you perceive, be the heat of passion, and the absence of any design to kill. By the heat of passion is not meant merely anger, it is rather what is commonly understood as fever heat; passion excited in such a degree as to deprive a man of his self control. A man may be in anger and yet not be in this heat of passion. If a man in this heat of passion, upon provocation, strikes a blow without intent to kill, and death ensues, he is guilty of manslaughter in the third degree. Now, if you consider whether the prisoner at the bar is guilty to this degree, the first thing you have to ask, as conscientious jurors, is, was he in the heat of passion? and I have explained what that meant. If he was, what provoked it? Was it the mere shutting of the door? was there sufficient provocation? did he design to effect death or not? If he designed to kill, as I have explained to you, it is not manslaughter in the third degree.

The prisoner's counsel claims that the case may come within the statutory definition of manslaughter in the fourth degree, as follows, viz.: "The involuntary killing of another, by any weapon or by means neither cruel nor unusual, in the heat of passion, in any cases, other than such as are declared to be

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excusable homicide, shall be deemed manslaughter in the fourth degree." You will perceive in the definition of manslaughter in the third degree, there is enumerated "heat of passion," "absence of design to kill," and the "use of dangerous weapon." In the fourth degree the words are "involuntary killing," and "any weapon." Now, gentlemen, if this is not manslaughter in the third or fourth degree, and is not excusable or justifiable homicide, then determine whether it is murder in the first or second degree. As I have said to you before, the taking of human life is a serious matter, and must be dealt with seriously. If a man uses a dangerous weapon, and strikes a blow calculated to produce death, the law presumes that he intends the natural consequences of his act. The presumption in law is that it is done with malice, and it is for you to say whether there is anything proven in this case to rebut or change that presumption.

The prisoner's counsel has requested me to charge upon certain propositions; part of them have been covered by what I have already said. He asks me to charge that the prosecution having proved that the defendant stated, immediately after the stabbing of deceased, that he did it in self defense, have made that statement evidence. I have already so charged you. You are the judges of the facts, and are to render your verdict upon all the evidence before you. He also requests me to charge that if the jury have any reasonable doubt, on the evidence, as to whether defendant is guilty of murder or manslaughter, they ought not to convict of the higher offense; and if they have any doubt as to whether the defendant is guilty of manslaughter or whether the killing was in self defense, they should acquit him.

These propositions are undoubtedly correct. You are bound to give the prisoner the benefit of every reasonable doubt. He also requests me to charge, that if the prisoner is proven by the evidence to have been guilty of killing deceased in the heat of passion, with a sword-cane, without a premeditated design to effect death, the jury should not convict of any

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higher offense than manslaughter in the third degree. I have already charged you that in substance. He also asks me to charge, that if the jury have any reasonable doubt arising, on the evidence, as to whether defendant is guilty or not of manslaughter in the third or fourth degree, they should (if they convict at all) convict only of manslaughter in the fourth degree. I have already charged you that upon any point upon which any reasonable doubt exists, the prisoner is entitled to the benefit of it.

The case, gentlemen, is with you. You are to decide of what offense, if any, the prisoner is guilty. If you find as matter of fact, that there was a mere dispute about opening a door, that the deceased went to close it, that the prisoner followed him with a sword-cane in his hand, it is for you to determine the purpose for which he did it. He has offered you no explanation in evidence on that point. It was not necessary for the opening or shutting of the door. If he carried it out with him, and then, upon a quarrel as to whether the door should be open or shut, struck three blows with it, which caused the death of the deceased, it is for you to say whether he is guilty of murder; if not what he is guilty of. There was, I have before stated, but one living witness to the transaction, and you have heard her story.

The doctor has told you that the second wound extended six inches into the body, and that the man died from the internal hemorrhage in a few minutes. Do you believe, on the evidence, that when the prisoner plunged this sword-cane three times into the deceased, he meant to kill him? If he meant to kill him, did he do it with premeditation and deliberation? If he did, it is, under the statute, murder in the first degree. If there was not that deliberation and premeditation I have before mentioned, it is murder in the second degree. If the act was willful, premeditated and deliberated, and the intent was not to kill, but to do bodily harm, and death ensued, it is, under the statute, murder in the second degree. If the act was done upon provocation, such as I have described, and in the heat of passion, without a design to kill, it would be manslaughter in

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the third degree; but if not in the heat of passion, and if it was with a design to effect death, it cannot be manslaughter, it must be murder. I shall say nothing further in the case. It is for you now to determine it upon the evidence before you.

The jury thereupon retired, and soon after came into court and rendered a verdict of guilty of murder in the first degree.

Subsequently, and on the fourth day of January, 1862, the counsel of said defendant, Moses Lowenberg, moved the court in arrest of judgment. The court denied the motion, to which decision counsel for defendant excepted.

After judgment, a writ of error was sued out, and the case removed into this court for review.

Henry L. Clinton, for plaintiff in error.

I. The plaintiff in error was, on the 11th of December, 1861, sentenced by the court below to suffer death on the 20th of February, 1863, and to be imprisoned in the State prison until such punishment should be inflicted. There is no authority in law for pronouncing any sentence upon a conviction for murder in the first degree, that being the offense of which the prisoner stands convicted.

The death penalty is abolished; and while the punishment for murder in the second degree, and manslaughter in the first, second, third and fourth degrees, is defined with precision, there is an entire omission in regard to murder in the first degree.

That portion of the Revised Statutes (§ 1 of title 1, ch 1, part 4) which provides that those convicted of certain crimes, including murder, "shall suffer death for the same," is abolished, by being amended so as to read, that those convicted of those offenses "shall be punished as herein provided." The words, "shall be punished as herein provided," are substituted for the words, *shall suffer death.*" (3 R. S., 935, § 1, 5th ed., Laws 1860; pp. 718, 714, § 7.)

What is the meaning of the words, "shall be punished as herein provided?"

The only punishment *therein* provided, was section twenty-

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five, which is as follows: "The punishment of death shall in all cases be inflicted by hanging the convict by the neck until he be dead."

This section is expressly abolished. (*Laws 1860, p. 714, § 11.*)

The enactment that those convicted of murder "shall suffer death for the same," is, in effect, abolished by being so amended as to strike out the words, "shall suffer death."

The provisions of the Revised Statutes, as to hanging, are expressly abolished. There was, then, when the prisoner was tried and sentenced, no punishment for murder, unless such provision is contained in the act of 1860.

This act nowhere provides that death shall be inflicted for any offense.

It expressly provides that certain crimes shall *not* be punishable with death. Section one says: "No crime hereafter committed, except treason and murder in the first degree, shall be punished with death in the State of New York." This provision is, that crimes other than treason and murder in the first degree, shall *not* be punished with death, not that treason and murder in the first degree shall be punishable with death.

Section four provides, that "when any person shall be convicted of any crime punishable with death, and sentenced to suffer such punishment, he shall at the same time be sentenced to confinement at hard labor in the State prison until punishment of death shall be inflicted."

This section does not say what crimes (if any) shall be punishable with death.

This section is utterly nugatory, unless some other section provides, in express terms, that some crime or crimes (specifying the same) shall be "*punishable with death.*"

There is no such section in the law of 1860, and the sections of the Revised Statutes which so provided are expressly abolished.

Section 5 of the act of 1860 is as follows: "No person so sentenced or imprisoned shall be executed in pursuance of such sentence within one year from the day on which such sentence of death shall be passed, nor until the whole record of the

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proceedings shall be certified by the clerk of the court in which the conviction was had, under the seal thereof, to the governor of the State, nor until a warrant shall be issued by the governor, under the great seal of the State, directed to the sheriff of the county in which the State prison may be situated, commanding the said sentence of death to be carried into execution." This section provides that no execution shall take place until after certain things are done. It does not provide that execution shall then or ever take place.

The 1st, 4th and 5th are the only sections which speak of punishment by death. None of these provide that any crime shall be punished with death.

The utmost that can be contended with plausibility, on the part of the prosecution (and even this is doubtful), is, that these sections presuppose the existence of other sections providing, in *express terms* (not by implication, deduction or inference), that those convicted of "treason and murder in the first degree" shall suffer death, and that the mode of death shall be in a particular manner, to wit, by hanging, or in some other manner defined with certainty and precision.

It is enough to say that no such provisions can anywhere be found upon the statute book (I make no allusion to the law of 1861, which can have no bearing upon this case); but, on the contrary, all the provisions which, within the rule of statutory construction, did contain anything of the sort, are expressly, and in unmistakable terms, abolished.

It is clear, from the Revised Statutes, the Laws of 1860, and the well recognized and inflexible rules of construction of statutes, that the court possesses no power to sentence on conviction for murder in the first degree, for the simple reason that there is no punishment for that offense provided by law.

There is no power to sentence to imprisonment in the State prison, under section 4 of the act of 1860, because that act provides that such a sentence can be inflicted only "*when any person shall be convicted of any crime punishable with death.*"

Inasmuch as there was, when the prisoner was sentenced, no "crime punishable with death," there is no authority of law

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to sentence to imprisonment in the State prison, or to impose any other punishment for this offense.

II. The inflexible rule, that penal statutes are to be construed strictly, renders it logically, legally, inevitably certain, that the power of punishment by death cannot be deduced by implication or inference, and that no such power exists in this case.

The attention of the court is invoked to the following, among the numerous authorities upon this point, illustrating the inflexibility of the principle:

"Penal statutes receive a strict interpretation. The general words of a penal statute shall be restrained for the benefit of him against whom the penalty is inflicted." (*Dwarr. on Stat.*, 684.) This author also very correctly observes (pp. 684, 685), "A penal law, then, shall not be extended by equity; that is, things which do not come within the words, shall not be brought within it by construction. The law of England does not allow of constructive offenses, or of arbitrary punishments. No man incurs a penalty, unless the act which subjects him to it is clearly both within the spirit and the letter of the statute imposing such penalty." "If these rules are violated," said BEST, Ch. J., in the case of *Fletcher v. Lord Lindes*, "the fate of accused persons is decided by the arbitrary discretion of judges, and not by the express authority of the laws."

Penal statutes must be construed strictly as against the citizen; and it is not sufficient that the offense charged be within the mischief which the legislature intended to prevent or redress, if it be not within the words which they have used.

Therefore, where a statute prohibited, within certain limits, the erection of wooden buildings and of wooden additions to buildings already erected, having in them a chimney or fire place, and the party had erected within such limits an addition to an old building, and had placed a chimney and fire place entirely *without* such addition, but looking into it, and fitted solely for its accommodation, it was held that these acts constituted no violation of the statute. (*Daggett v. State*, 4 Conn. R., 60.) In this case, HOSMER, Ch. J., in delivering the opinion of the court, said: "The rule has long been established, that penal

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statutes must be construed strictly. (*Reniger v. Fogossa*, 1 *Plowd. R.*, 17; *Commonwealth v. Bowles*, 1 *Salk.*, 205; 1 *Bl. Com.*, 88.) More correctly it may be said, that such laws are to be expounded strictly against an offender, and liberally in his favor. This can only be accomplished by giving to them a literal construction, so far as they operate penally; or, at most, by deducing the intention of the legislature from the words of the act. (*Heydon's Case*, 8 *Co. R.*, 7; *The King v. Gage*, 3 *Mod. R.*, 64.) In extension of the letter of the law, *nothing may be assumed by implication*, nor may the mischief *intended* to be prevented or redressed, as against the offender, be regarded in its construction. It was the object of the principle to establish a certain rule, by conformity to which mankind should be safe, and the discretion of the judge limited. How much this must contribute to the security and enjoyment of the citizen, is too palpably obvious to require illustration. Upon the before mentioned principle, it has been adjudged that an act made to punish the person who stole a *cow* is not applicable to him who steals a *heifer* (*Richard Cooke's Case*, *Leach's C. L.*, 109); and a law prohibiting the transportation of provisions in any wagon or otherwise to an enemy, is not infringed by driving fat oxen on the leg. (*The United States v. Sheldon*, 2 *Wheat. R.*, 119.) That the mischiefs at which these laws were aimed existed in both the cases alluded to, is past a question; but the acts prosecuted, not being within the words of the legislature, were considered as not within the prohibitions of the laws. I will only add, that the moment the strict construction of penal laws is abandoned, the difference between their interpretation and that of remedial laws must terminate, as there is no middle ground between them." (*Id.*, 63 and 64.)

And cannot be construed to mean *or*, in a penal statute. The 14th section of the act of the 14th July, 1832, as it stands, does not declare any forfeiture to attach upon the mere want of correspondence between the goods and the entry as a substantive and independent ground of forfeiture. Possibly there may be an omission of some words, by which it was intended to declare a forfeiture in such case; but as it is a penal statute,

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they cannot be supplied by intendment. (*The United States v. Ten cases of shawls*, 2 *Paine's C. C. R.*, 162.)

THOMPSON, J., in the above case, says: "By the 4th section of the act of 1830, it is provided that if, upon the examination, any package shall be found to contain any article not described in the invoice, or if such package or invoice be made up with intent to defraud the revenue, the same shall be forfeited. The disjunctive particle *or* being used, the forfeiture declared may attach to the want of correspondence as well as to the fraudulent intent; but in the act of 1832 the conjunctive particle *and* is used in the like connection, and which, in a penal statute, cannot be construed *or*." (*Id.*, 165, 166.)

In *The Case of the Schooner Enterprise* (1 *Paine's C. C. R.*, 32), LIVINGSTON, J., in delivering the opinion of the court, says: "For, although ignorance of the existence of a law be no excuse for its violation, yet, if this ignorance be the consequence of an ambiguous or obscure phraseology, some indulgence is due to it. It should be a principle of every criminal code, and certainly belongs to ours, that no person be adjudged guilty of an offense unless it be created and promulgated in terms which leave no reasonable doubt of their meaning. If it be the duty of a jury to acquit where such doubts exist concerning a fact, it is equally incumbent on a judge not to apply the law to a case where he labors under the same uncertainty as to the meaning of the legislature. If this be involved in considerable difficulty, from the use of language not perfectly intelligible, unusual circumspection becomes necessary, especially if the consequence be so penal as scarcely to admit of aggravation. When the sense of a penal statute is obvious, consequences are to be disregarded; but if doubtful, they are to have their weight in its interpretation. It will at once be conceded that no man should be stripped of a valuable property, perhaps of his all; be disfranchised, and consigned to public ignominy and reproach; unless it be *very clear* that such high penalties have been annexed by law to the act which he has committed." (*Id.*, p. 34.)

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If the statute is ambiguous, the court ought not to inflict the penalty. (1 *Paine's C. C. R.*, 82.)

An act, subjecting one to punishment, must be within both the letter and spirit of the law. (*Crosby v. Hawthorne*, 25 Ala., 221.)

A penalty cannot be created by implication. (*Jones v. Estis*, 2 Johns., 380.) In this case the court say: "A penalty cannot be raised by implication, but must be expressly created and imposed."

Berry v. Ripley (1 Mass. R., 167), is an authority to the same point.

An averment that the ship was fitted out, &c., "with intent that the said vessel should be employed," was held fatally defective; the words of the statute being, "to employ." (*United States v. Gooding*, 12 Wheat. R., 460.)

In *Elam v. Ransom* (21 Geo. R., 149), the court, per BRUNING, J., says: "The common law leans toward that construction of all statutes which is in favor of personal liberty, not that which is against personal liberty."

In *Lair v. Killmer* (1 Duch. R., 522), the court, per Chief Justice GREEN, says: "In defining the crime and the punishment, penal statutes are to be taken strictly and literally. A penal law cannot be extended by construction. The act constituting the offense must be both within the spirit and the letter of the statute."

In *Commonwealth v. Carroll* (8 Mass. R., 490), breaking and entering in the night time a warehouse with intent to steal, &c., was held not to be within the provision that if any person "shall in the night time enter, without breaking, or in the day time break and enter," &c.; and yet no one can doubt that the legislature intended to provide against breaking and entering in the night time.

In *State v. King* (12 Louis. R., 593), it was held, that in construing penal statutes, courts cannot take into view the motives of the lawgiver, further than they are expressed in the statute.

The case of *Hartung v. The People* (22 N. Y. R., 95), con-

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tains nothing in the slightest degree conflicting with the authorities above cited. Judge DENIO, in his very able and elaborate opinion, nowhere intimates that penal statutes are not to be construed strictly, and in accordance with the authorities here cited. He does intimate, however, that it was the intention of the legislature of 1860, to preserve the punishment of death. He does not, however, express the opinion that the legislature did preserve capital punishment. The subject of construing penal or criminal statutes strictly, was not before the court. The question was, whether the legislature possessed the power, no matter with what certainty and precision the act was worded, to impose a punishment for an offense different in kind from that which existed when the crime was committed. The court held that no such power existed, and that a law which had that effect, was *ex post facto* and unconstitutional.

In reference to the law of 1860, Judge DENIO observes, that it is "inferable from the 1st section, and also from the 4th and 5th sections, that capital punishment was intended to be retained." All the authorities show, that if such an intention be merely "inferable," and not contained in express words, it is of no avail; for, in the language of GREEN, Ch. J. (1 *Duch. R.*, 522, *above cited*), "In defining the crime and the punishment, penal statutes are to be taken strictly and literally. The penal law cannot be extended by construction."

Judge DENIO further observes: "It is true that in the declaration of the first section, that no crime, except treason and the first degree of murder, should be punished with death, there is an implication, in the nature of a negative pregnant, that those crimes shall be so punished." In reference to the 4th section, he says: It may be "implied" that such was the intention of the legislature, and that in the 5th section there is an "implication" to the same effect.

While, with reference to the intention of the legislature to preserve capital punishment, the learned judge only uses the words "inferable," "implied" and "implication," he quite as distinctly concedes that "there was not in either of these sec-

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tions, or elsewhere in the act, any separate provision for the punishment of that crime (murder in the first degree), or which declared that any crime should be punished with death." This is quite sufficient to dispose of the case of the plaintiff in error in his favor, for all must concede that the "letter of the law" of 1860, does not prescribe the punishment of death. In the language of HOSMER, Ch. J., in *Dagget v. The State* (4 Conn. R., 63), "In extension of the letter of the law, nothing may be assumed by implication; nor may the mischief intended to be prevented or redressed, as against the offender, be regarded in its construction."

Although the counsel for the plaintiff in error have no doubt that the legislature of 1860 intended to abolish capital punishment, founding their opinion upon the skillful manner in which every section of any statute which could, within the rules of construction of criminal statutes, have the effect to continue that punishment, was abolished, yet they do not deem it of any particular importance whether the legislature so intended or not, it being sufficient, that if they intended to continue capital punishment, they did not carry that intention into effect, but, on the contrary, abolished capital punishment. Whether that was the result of deliberate design or inadvertence, can make no difference in the result of this case.

III. The sentence of the plaintiff in error, that he shall "suffer death," is vague, indefinite and uncertain, and for that reason not susceptible of enforcement.

The sentence does not even provide that the prisoner shall suffer death by violence. The sentence is as uncertain as the law under which it was pronounced. The officer appointed to execute the sentence has no power to select the mode of death; to give him this power would be to clothe him with judicial functions and attributes. The sentence, within every rule of law applicable to the case, is a nullity.

IV. The plaintiff in error was tried and convicted in the Court of General Sessions of the peace, in and for the city and county of New York, on the 11th day of December, 1861, and was sentenced on 4th of January, 1862. The Decen-

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ber term of the court expired on the third Saturday of that month, and the next term of the court could not begin until the first Monday of January, 1862, which came on the sixth day of the month. There was no law in existence at that time which permitted the New York General Sessions of the peace to hold court and pass sentence between the third Saturday of December and the sixth day of January following, the latter being the first Monday of the month. That court being one of limited jurisdiction, and deriving its powers only from express statutes, of course could not sit, except at the times specified in the statutes. The following are the only statutes applicable to the subject:

"The said Court of General Sessions (that is, 'the Court of General Sessions of the Peace in and for the city and county of New York') (3 R. S., 811, § 66, 5th ed.) shall commence and be held on the first Monday in every month, and may continue and be held every day from the commencement thereof, until and including Saturday in the third week thereafter." (3 R. S., 812, § 70, 5th ed.)

"Whenever the trial of a cause shall have been commenced in the Court of General Sessions of the Peace, in and for the city and county of New York, and the same shall not be concluded before the expiration of the term of said court, it shall be lawful for the said court to continue in session until the conclusion of said trial, and to proceed to judgment if they shall so deem necessary, in cases where conviction shall be had." (*Laws of 1846*, p. 4.)

An act to empower Courts of Sessions, in the several counties of this State, to extend their terms, and authorizing certain adjournments of such courts, passed April 9, 1859, provides as follows (*Laws 1859*, p. 465, § 1): "It shall be lawful for the Court of Sessions of any county of this State, to continue its sittings at any term thereof, so long as it may be necessary, in the opinion of such court, for the dispatch of any business, or the determination of any cases that may be pending before such court."

"§ 2. The Court of Sessions of any county in this State,

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shall hereafter have, and may, in their discretion, exercise all the powers in regard to adjournments thereof, from time to time, which are now by law conferred upon or exercised by the Court of Oyer and Terminer of such county, in relation to adjournments of said last named court."

None of the statutes above cited gives the New York General Sessions of the Peace the power to extend its terms beyond the third Saturday after the first Monday of the month.

The act of 1859 does not confer this power, for the reason that it refers to the "Court of Sessions of any county." This language does not embrace the New York General Sessions of the Peace, in and for the city and county of New York.

This court expressly held, at the last General Term, that the phrase, "the Courts of Sessions of the several counties," did not include "the General Sessions of the Peace in the city and county of New York." (*People v. Court of General Sessions of the city and county of New York*, reported in *N. Y. Transcript*, Oct. 18, 1862.)

Justice INGRAHAM, in delivering the opinion of the court, observes: "These various provisions, to which I have referred, show, I think conclusively, that the old courts of General Sessions, *except in the city of New York*, were not continued after the Constitution of 1847, but that new courts were organized in all the other counties of the State under a different name, while the General Sessions in New York was continued with all its then powers and jurisdiction, and has been so recognized by the legislature in all laws passed since the adoption of the Constitution relating to the said court." * * "If this view be correct, the only question would be, whether the term 'Courts of Sessions,' as used in the act of 1859, is to be construed as applying to all the courts in this State of that name, and also to the General Sessions of the Peace in the city of New York."

The learned judge then proceeds to show that the language, "Courts of Sessions of the several counties" has no reference to the "General Sessions of the Peace in this city and county."

The act of 1846, above cited, does not give the court the power to extend its term, except in a case the trial of which

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"shall not be concluded before the expiration of the term of said court." In that event it merely gives the court power "to continue in session until the conclusion of said trial, and to proceed to judgment, &c." In the case of Lowenberg, the trial ended on the eleventh day of December, A. D. 1861, about two weeks before the third Saturday of term.

It is clear, therefore, that none of these statutes gives the court the power to sit and pass judgment between the third Saturday of one term and the first Monday of the next term.

In construing these statutes, the attention of the court is invited to the authorities cited under point II. The rule of strict construction must prevail.

The sentence is not only vague, indefinite, uncertain, and not only susceptible of enforcement, but was passed by a court not in existence at the time.

V. The judgment of the court below should have been arrested.

Nelson J. Waterbury (district attorney), for the People, contended that the sentence of the prisoner was not illegal, and was capable of enforcement.

PECKHAM, J. I incline to think enough may be gathered by putting together parts of its different sections to hold and adjudge that murder, "of the first degree," as therein defined, was a "crime punishable with death," as prescribed in the 4th and 5th sections of the laws of 1860, page 712.

The first section of that act declares that "no crime hereafter committed, except treason and murder of the first degree, shall be punished with death."

It is true this section does not affirmatively enact that these crimes shall be so punished, but it does declare that no others shall.

The 2d section defines murder "of the first degree."

The 4th and 5th sections prescribe the punishment of persons "convicted of any crime punishable with death," but do not declare or define crimes so punishable. The 6th section prescribes the punishment of "murder in the second degree."

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Section 9th declares that "the provisions of this act for the punishment of murder in the first degree shall apply to the crime of treason."

This is a strong implication that the punishment prescribed in the 4th and 5th sections, for persons "convicted of any crime punishable with death," applies to the crime of murder of the first degree, as there are but two punishments prescribed in that act, and one is confined expressly to persons guilty of "murder in the second degree."

The other punishment is therefore necessarily applied to murder in the first degree.

The 8th section recognizes the same thing.

The 7th section is only confusing, but does not destroy the enactments of the others.

But, assuming that "murder of the first degree," of which the prisoner is convicted, is by this act punishable with death, is the act, in that respect, constitutional?

The 5th section of the 1st article of the Constitution of 1846, declares that "cruel and unusual punishments" shall not be inflicted.

Execution by hanging was the mode adopted and required by law prior to the act of 1860, but that act expressly repealed the statute as to hanging, and has substituted nothing in its place.

In *The People v. Hartung* (22 N. Y. R., 107), Judge DENIO properly says that it is not clear whether, under this act, "the manner of the execution should be determined by the court, the governor, or the sheriff."

If it cannot be decided which one has the power to direct the manner of the execution, can either one exercise any such power? I think all would agree, having reference to the duties of the different officers, that the manner of the execution should be directed by the court. Prior to this statute, I think, the court has always so directed in this State. If it were the duty of the court, then the court committed an error in this case, in omitting to give such direction.

It may justly be added, that there is nothing in the act in

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terms authorizing either the court or the governor to direct the manner of the execution.

If the execution, then, shall ever be effected, its manner, practically, will rest entirely in the discretion of the sheriff.

The prisoner may thus "suffer" death in any manner agreeable to the discretion or the caprice of the sheriff. He may shoot, burn or torture him, or even starve him to death.

It is no answer to say that the prohibition in the Constitution is equally obligatory upon the sheriff as upon other officials.

Where is the remedy in case of its violation in such a case? This constitutional prohibition was directed to the legislature. It was intended to guide and govern their legislation. It was never aimed at a mere executive officer, whose whole duty, under our government, is simply to carry into effect a certain and declared law.

Suppose the legislature should enact that a person guilty of a certain offense should suffer such punishment, except hanging, as the sheriff of the county where he should be sentenced to jail, should think proper to inflict.

Would that be a valid law? I think not, for one reason—because it would permit, not that it directed, cruel and unusual punishments. The Constitution intended that the legislature should declare punishments not cruel and unusual—not leave it to the discretion of a sheriff whether they should be inflicted—and that is the view of this statute.

But there is another difficulty in the record in this case which I think fatal to this conviction.

The Court of Sessions, sitting on the fourth day of January, 1862, sentenced the prisoner to be executed on the 20th day of February, 1863, and "to imprisonment at hard labor until such punishment of death shall be inflicted."

The court thus inflict a punishment of over thirteen and a half months at hard labor, besides the punishment of death, when the act only authorizes a sentence of a year at hard labor.

In the *People v. Hartung*, before cited, the court expressly

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held that imprisonment at hard labor before execution, was an additional punishment, and in that case, as it was imposed by an act passed after the offense had been committed, the court held it to be an *ex post facto* law, unconstitutional and void. In the case at bar this additional imprisonment or punishment being wholly unauthorized by law, is therefore illegal and void.

It may be urged that the governor, being authorized to issue his warrant for the prisoner's execution, may do so under the act at any time after a year from such sentence, whether the time shall have arrived for the execution, according to the sentence, or not.

It is true he may and must wait until after the expiration of the year from the time sentence was pronounced, but has he any authority to issue his warrant for the execution before the time fixed by the sentence? No such authority is given him. He does not pass or pronounce the sentence. He simply commands it "to be carried into execution."

But assuming that this act is utterly void for any reason, so far as regards the death penalty, is the punishment of imprisonment thereby rendered ineffectual, or in any degree impaired? I incline to think not.

Suppose the act had declared that any person guilty of murder in the first degree should be confined in prison until the legislature should pass a valid law to hang him. Very probably the legislature might not have the power to pass a valid law to that effect. It might be regarded as an *ex post facto* law; but would such a provision nullify or impair the penalty of imprisonment? I think not. It would be simply another way — an oblique and crooked way, perhaps — of imposing a penalty of imprisonment for life.

It is by no means clear that the legislature, or the author of this statute, intended that the convict should be ever actually executed. All the provisions as to inflicting death seem intended rather for alarm than for real peril to the convict.

By the fifth section it is declared that no execution shall take place until the whole record of the proceedings shall be

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certified by the clerk of the court to the governor, nor until the governor shall issue his warrant, &c. Yet there is no statute making it the duty of the clerk to transmit such certified copy. Nor is the governor required ever to issue his warrant. He is not, even affirmatively, in terms authorized to issue it.

Holding the statute effective, therefore, as to the imprisonment, and void as to the death penalty — that passing a formal sentence of death, in itself utterly void and that cannot be executed, accompanied with a sentence of imprisonment until the punishment of death shall be inflicted, is simply a mode of sentencing to imprisonment for life, this judgment may be sustained.

LEONARD, J. The act of 1860 distinctly recognizes, as an existing fact, that certain crimes are punishable with death.

Is murder such a crime? From the earliest ages until the enactment of the statute referred to, murder has been uniformly punished with death by the nation to which the colony of New York belonged in 1775, and at the time of our separation from the mother country. The statutes and common law of that country are, by the Constitution of this State, continued in force, except so far as they are repealed or abrogated.

The act in question has not repealed or abrogated the penalty of death in case of murder, nor has any other statute of this State. On the contrary, the act of 1860 excepts murder in the first degree, from the abrogation of the death penalty as a punishment for crimes.

The 4th section provides a distinct penalty for crimes punishable with death. The offender shall be sentenced to confinement at hard labor in the State prison until the punishment of death shall be inflicted.

It is made the duty of the court to pass this sentence upon the conviction of the offender.

The mode of inflicting death is not prescribed. No warrant can therefore be issued by the governor for the execution of the person convicted and sentenced.

The condemned offender will remain, necessarily, in the State prison, awaiting the warrant, the residue of his life.

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This result was, perhaps, the intention of the author of the act, although not probably that of the legislature.

The intention of the author or of the legislature, is not, however, referred to as an argument for or against the judgment.

The sentence pronounced is within the letter of the statute, in my opinion.

The crimes punishable with death, referred to in the 4th section of the act of 1860, are not limited to cases where the penalty of death is provided by statute.

The first section of the late act is inconsistent with, and must be held to have repealed the first section of title one, chapter one, part fourth of the Revised Statutes, without the amendment provided by section seven of the act. That amendment is, however, disconnected from everything else in the chapter, and stands without any legal effect.

No argument is to be drawn, therefore, from the words "as herein provided," contained in the amended section, limiting the description of the offender contained in 4th section of the act, so as to require a statutory direction to include the offender who is to be sentenced.

The objection that the sentence was passed after the expiration of the term of the court, or in vacation, is not well taken.

It does not appear that the term had closed. The Court of General Sessions of the peace is authorized to continue its term so as to complete any unfinished trial. The term may have been prolonged from that cause. The presumption of law is in favor of the regularity of the proceedings of courts of justice.

The judgment ought to be affirmed.

INGRAHAM, P. J. (dissenting). The prisoner was tried and convicted in the Court of General Sessions, of the crime of murder in the first degree, and was sentenced to imprisonment and death.

The murder was committed on the 14th of November, 1861. The trial took place on the 11th of December, 1861, and the

prisoner was sentenced on the 4th of January, 1862, in the fourth week after the commencement of the December term. The court had been extended for the trial of another case, and during the week for which it was so extended, the sentence took place.

The great question we are called upon to decide in this case, arises, upon the construction of the act passed in 1860, in "relation to capital punishment, and to provide for the more certain punishment of the crime of murder." (*Laws of 1860, ch. 410.*)

Prior to the passage of this act, the law for the punishment of murder was contained in the Revised Statutes (8d vol., p. 985).

The 1st section of this statute was simple and easily understood, and provided "that every person who should thereafter be convicted of treason, of murder, or of arson in the first degree, should suffer death for the same." The same chapter provided for the mode of execution, and the time within which it should take place.

By the act of 1860, the 1st section of the chapter of the Revised Statutes above referred to was amended so as to read as follows:

"Every person who shall hereafter be convicted of, 1st, treason against the People of this State, or 2d, of murder, or 3d, of arson in the first degree, as those crimes are declared in this title, shall be punished as herein provided."

The effect of this amendment was to abolish the section of the Revised Statutes as it existed at the time of the passage of the act of 1860, and to substitute in its place the section as adopted in that act.

It was thus enacted by the 1st section of that chapter of the Revised Statutes, as amended, that the crime of murder should be punished as provided for in the title 1, chapter 1, of part 4, of Revised Statutes. There is no section in the whole title, which provides any punishment for murder.

There never was any such provision, except in the first section, which was virtually repealed and taken away by the

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amendment of 1860, and we look in vain throughout the whole chapter for any punishment to be inflicted for this offense.

But, as if to destroy entirely the supposition that anything was to be left in the statute sanctioning the punishment of death for murder, under the provisions of that act, the law of 1860 also repealed the section fixing the time for executing such punishment, the provisions for submitting the case to the governor for revision before execution, the provisions for reprieves in certain cases for females, the mode of execution by hanging, the directing the execution in the prison yard, and the provision for another place of execution, in case the prison of the county was unfit therefor.

While, therefore, the amended first section required the crime of murder to be punished as therein provided, the only portion of the chapter that contained any punishment had been taken away, and every portion of the chapter that contained anything relating to the punishment of death was utterly repealed.

We look in vain, therefore, throughout this title of the Revised Statutes for any punishment prescribed for the crime of murder, and unless some other provision is made in another statute, no such punishment can be found in the laws of this State as they existed at the time of this offense.

In the act of 1860, there is no punishment expressly provided for murder in the first degree.

The 1st section enacts that no other crime than treason and murder, in the first degree, shall be punished with death. This is a provision for limiting the punishment of other offenses, not providing punishment for the excepted cases, and while the statute provides a punishment for murder in the second degree, for arson and other offenses, it leaves the punishment for the greater offenses not only undefined, but if they can be discovered at all from the act, to rest on inferences merely to be drawn from the negative provisions of the first section.

It cannot be denied that at the time of the commission of this offense there was no provision of the law directly pre-

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scribing the punishment of death for treason or murder in the first degree, or directing any punishment whatever, and if the court directs the execution of the prisoner, or the sheriff carries out such direction, the court and sheriff must act, in taking the life of a human being, without any direct authority of law, and upon a mere inference to be drawn from a negative provision of a statute, and from the absence of any law providing any other punishments. When a public officer is called upon to take the life of another, he may well ask that his duty should be clearly laid down by the law; that such acts should not rest on mere inference or implication, but that he should have his warrant for what he does in the clear provisions of the statute and the mandate of the court. To take away the life of a prisoner under a doubtful construction of the law, or on a mere inference or implied authority from the absence of legislative provisions, might lead to a judicial murder rather than to carrying into effect the law of the land.

It is very clear that the legislature did not intend that all the offenses enumerated in the first section of the title in the Revised Statutes above referred to, should be punished with death. In that section was included the offense of arson in the first degree, and not even by inference can any authority be found for a greater punishment for this offense than imprisonment at hard labor in the State prison.

So the General Term of this district held, in the case of *Shepherd*, and in that case the Court of Appeals have since held that under the act of 1860 he could not be sentenced to any punishment. Whether such was the intent of the author of the act of 1860, in regard to the crime of murder, is a question not free from difficulty. The omission to provide, by direct enactment, any punishment for the highest crimes known to the law — treason and murder — the cautious repeal of every provision of the Revised Statutes bearing upon the death penalty or relating thereto, especially the absolute repeal of the section providing the mode of execution by hanging, without substituting any other direction as to the mode by which death was to be inflicted, do not make the duty of the

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court clear or free from doubt, so as to warrant us in saying that the legislature clearly intended to retain the punishment of death for this offense.

I purpose now to examine the cases decided in the Court of Appeals, in which the act of 1860 has been the subject of discussion. These are, *The People v. Hartung* (22 N. Y. R., 95), and *The People v. Shay* (22 N. Y. R., 317).

It must be remembered that these cases were for offenses committed before the passage of the act of 1860, and the question involved in these cases was not whether offenses committed after its passage could be punished under it, but whether the repeal of the statute and the additional punishment of one year's imprisonment, as provided for in the fourth section, did not prevent the execution of the judgment, and the court decided such to be its effects.

The reason given for the reversal of the judgment, was that there was not at the time any law which authorized or sustained it, or which would warrant its execution; and in the case of *Shay*, all the exceptions at the trial, and the motion in arrest, were decided against the prisoner, but that judgment was also reversed, for the reasons stated, in the case of *Hartung*.

We have been referred to the views of the learned justice who delivered the opinion in those cases, as authority for holding that the punishment of death was retained by the act of 1860.

The substance of these views is, that no law at the time contained any separate provision for the punishment of murder in the first degree, or which declared that any crime should be punished with death; that if there was any punishment, it could only be known by inference or implication; that in the first section, which declared that no crime but treason and murder in the first degree should be punished with death, there "is an implication in the nature of a negative pregnant, that those crimes should be so punished;" that in the fourth section of the statute it was also implied that there were some crimes to be punished capitally, and, upon considering the whole law, that the intention to preserve the punishment of

death, when the governor shall approve of the sentence, in addition to imprisonment for one year, was so manifest that the court would assume such to be the effect of the statute.

It could not be necessary in that case to decide whether there was any punishment provided in the act of 1860 for the offenses of treason and murder in the first degree, if committed after the passage of the act. Although the act of 1860 provided that persons under conviction or sentence should be punished as if convicted under that act, still Judge DENIO held that there was not at that time any law which authorized or sustained the judgment, or would warrant its execution.

We are left, then, to the simple question whether, when the statute contains no provision imposing the punishment of death for murder in the first degree, such punishment should be inflicted, merely because it might be inferred from the statute that the legislature supposed the punishment of death was retained, or that such punishment should be inflicted, because in another part of the statute provision was made as to the action of the governor before the sentence could be carried out.

I cannot assent to the proposition that the court should condemn to death simply because they can guess that the legislature intended to preserve this punishment. Nor do I assent to the conclusion that it is very clear that any such intention existed. The alteration of the section which contained this punishment of death, the omission to substitute any other punishment, the studied repeal of the provisions relating to such executions, and particularly the repeal of the section which declared the mode in which such death should be effected, seem to me rather to imply that it was not intended to have such punishments continued. It is a well settled principle in the construction of a penal statute, that it must be construed strictly (*Sprague v. Birdsall*, 2 Cow. R., 419); and a penalty cannot be raised by implication, but must be expressly created and imposed. (*Jones v. Estes*, 2 Johns. R., 379.)

If so much strictness is required merely to impose a penalty

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for the violation of law, of how much more importance is it to require clear warrant for the penalty of death and full authority to take human life, not merely resting on inference and implication, but on the full and express provision of law therefor.

It has been suggested that the defect of our statutes might be remedied by invoking the doctrine that a repeal of a statute, without substituting any in its place, revived the rules of the common law. This may be so, and may relieve the difficulty which would exist as to the mode of execution; but a difficulty will at once arise from the fact that it is not a mere repeal of a statute, but an amendment, in which the offense is regulated, and which purports elsewhere to provide a punishment, by directing that it should be punished "as is herein provided." It can hardly be said that the statute on this subject is repealed, so far as to revive the common law offense of murder and the common law punishment, while that statute remains in force.

I am aware that, in *The People v. Hartung* (23 How. Pr. R., 814), a contrary opinion was expressed by HOGEBROOM, J., as to the effect of the act of 1860 on this question; but as the offense in that case was committed before the passage of the act, it can hardly be considered as controlling in this case.

The judgment should be reversed.

Judgment affirmed.¹

¹ NOTE. — This judgment was affirmed by the Court of Appeals, in October, 1863, but not on all the grounds stated in the above opinions. The leading opinion in the Court of Appeals holds that the court erred in naming the day for the execution of the prisoner, but that was not a sufficient reason for reversal; that the day should be left to be designated by the governor; that, though the statute, declaring that the punishment of death should be inflicted by hanging, is repealed, it does not abrogate the common law which prescribed the same mode of punishment. BALOOM, J., said: "The proper sentence would have been, that the prisoner suffer death for the crime of murder in the first degree, in killing Samuel Hoffman, at the city of New York, on the 14th day of November, 1861, whereof he has been duly convicted, by being hung by the neck until he be dead, by the sheriff of the county in which he shall be imprisoned, at such time and place, after the expiration of one year from the date of his sentence, as such sheriff shall be commanded by a warrant issued by the governor, under

SUPREME COURT. New York General Term, May, 1863.
Sutherland, Clarke and Barnard, Justices.

THE PEOPLE v. LOUISA NASH.

The city judge of the city of New York has no power to issue a writ of *habeas corpus*; under the statute of this State, the issuing of such writ is a ministerial and not a judicial act.

In a temporary commitment by a magistrate, for further examination, on a charge of larceny, it is not necessary to state whether it is grand or petit larceny, or what articles are alleged to have been stolen. (*Per BARNARD, J.*)

Form of proceedings to remove a decision by the city judge, on *habeas corpus*, into the Supreme Court for review, on a *certiorari* sued out in behalf of the People.

On *certiorari* to the city judge of the city of New York, the following return was made:

To the Honorable the Justices of the Supreme Court of the State of New York for the First Judicial District:

In compliance with the within writ of *certiorari* to me directed, I do hereby certify and return to your honorable court that the papers hereto annexed, and marked respectively "A," "B," "b," and "C," are copies of all proceedings had before me in the within entitled matter, the originals of which are on file in the office of the warden of the city prison of the city of New York.

JOHN H. McCUNN, *City Judge.*

Dated New York, April 27th, 1863.

NEW YORK SUPREME COURT.

In the matter of The People of the State of New York.	}
v.	
Louisa Nash.	

City and County of New York, ss:

A. OAKLEY HALL, district attorney of the city and county of New York, being duly sworn, deposeth and saith, that he

the great seal of the State, and that he be confined in the State prison, at hard labor, until such punishment of death shall be inflicted."

See, also, an interesting opinion by CAMPBELL, J., in *Done v. The People*, page 364 of this volume.

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is informed and believes that, on the 17th day of February last, a writ of *habeas corpus* was tested from the Supreme Court, allowed by and returnable before the Hon. JOHN H. McCUNN, city judge of said city, a copy whereof is hereto annexed and marked "A." That to said writ a return was made, of which a copy is annexed "B." That on said return the matter was heard before said city judge, and on the 18th day of February last an order was made by said city judge, a copy whereof is hereto annexed marked "C;" and under said order, the said Louisa Nash, the party named therein, was discharged from custody, and a final adjudication was thereupon made by said city judge, and further saith not.

A. OAKLEY HALL

Sworn to before me, this 27th {
day of February, 1863. }

JESSE O. VANDERPOEL, *Commissioner of Deeds.*

The People of the State of New York, to the Honorable JOHN H. McCUNN, City Judge, of the city of New York, GREETING:

Whereas, we have been informed by the official affidavit of the district attorney of the city and county of New York,

That a writ of *habeas corpus* was heretofore issued by you under your hand and seal, on behalf of one Louisa Nash, and directed to the warden of the city prison, in the city and county of New York, and the said writ of *habeas corpus* required the said warden to have the body of the said Louisa Nash before you, the said city judge, to be dealt with according to law. And whereas, pursuant to the requirements of the said writ, the body of the said Louisa Nash was brought before you, and whereas a return was made upon the said writ, and that thereupon you proceeded to hear and determine the said writ: and whereas such proceedings were had upon the said writ and said return that you, the said city judge did order, adjudge, and determine that the said Louisa Nash should be discharged from the custody and restraint of the warden of the city prison, and we, being willing to be certified of such proceedings as we have had before you, do command and strictly enjoin you to certify and return those proceedings,

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with all things, papers and schedules thereto appertaining, unto our justices of our Supreme Court, at the city hall, in city of New York, on the first Monday in May next, at the General Term of said court, under your hand, as fully and amply as the same remain before you, so that our said justices may further cause to be done thereupon what of right, and according to law, ought to be done; and have you then and there this writ.

Witness — JOSIAH SUTHERLAND, one of the justices of our [L. s.] said court, at the city hall, in the city of New York, this 27th day of February, A. D. 1863.

A. OAKLEY HALL, *District Attorney.*

By the Court,

H. W. GENET, *Clerk.*

[ENDORSED.]

I allow the within writ — New York, February 27, 1863.

GEORGE G. BARNARD, *Justice.*

"A."

WRIT OF HABEAS CORPUS.

The People of the State of New York, to Charles Sutton, Esq.,

[L. s.] *warden of the City Prison of the city of New York,*

GREETING:

We command you that you have the body of Louisa Nash, by you imprisoned and detained, as it is said, together with the time and cause of such imprisonment and detention, by whatever name she shall be called or charged, before Hon. JOHN H. McCUNN, city judge of the city of New York, at his office, No. 29 Wall street, in said city, forthwith on receipt of this writ, to do and receive what shall then and there be considered concerning him; and have you then and there this writ.

Witness, GEORGE G. BARNARD, Justice of the Supreme Court of New York, the 17th day of February, one thousand eight hundred and sixty-three.

H. W. GENET, *Clerk.*

CHAR. S. SPENCER, *Attorney.*

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[INDORSED.]

In re Louisa Nash.—Writ of Habeas Corpus.—Chas. S. Spencer, attorney.

Allowed, this 17th day of February, 1863.

JOHN H. McCUNN, *City Judge.*

“C.”

The within named, Louisa Nash, is hereby discharged, the commitment being illegal, it not specifying the crime for which she was committed, whether it is petit or grand larceny, or what articles it is alleged she has stolen. The commitment is clearly defective for these reasons. Mr. Blunt, assistant district attorney, appearing for the People; and admission of notice filed by Mr. Garvin, assistant district attorney.

New York, February 18, 1863.

JOHN H. McCUNN, *City Judge.*

“B.”

COMMITMENT.—TEMPORARY.

City and County of New York, ss:

To the policemen and constables of the said city, and every of them; and to the keeper of the City Prison of the said city.

These are, in the name of the People of the State of New York, to command you, the said policemen and constables, and every of you, to convey to the said prison, the body of Louisa Nash, and deliver her to the keeper thereof; and you, the said keeper, are hereby commanded to receive into your custody, in the said prison, the body of the said Louisa, who stands charged before me, on the oath of Mary Murphy, with the offense of committing larceny, as a pickpocket, from the person of said Mary Murphy. And that you safely keep the said Louisa Nash in your custody, in the said prison, until the above said charge be investigated and determined by me, according to the statutes, in the case of arrest and examination of offenders, made and provided.

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Given under my hand and seal, in the said city, this thirteenth day of February, 1863.

MICHAEL CONNOLLY, [L. s.]

Police Justice.

On discharging the prisoner, the following opinion was delivered by MCCUNN, city judge:

The commitment charges the prisoner, "on the oath of Mary Murphy, with the offense of committing larceny, as a pickpocket, from the person of said Mary Murphy," but does not allege what was taken from the person of Mary by the accused, nor the time, place or any circumstance to show that the offense had been committed.

It is necessary to set forth the particular species of crime alleged against the accused with convenient certainty. And if it is an offense which is created by statute, it has been held that the terms of the statute should be pursued in describing it; and for this reason, that by using other words than those which the legislature has used, it may happen that the offense will not be sufficiently described. This was held in *Rex v. Remnant* (5 Term R., 169; 2 Leach R., 583), and is regarded as authority here.

And so a commitment was held to be insufficient where it alleged that the prisoner had, "with force and arms, made an assault on the prosecutor, with intent feloniously to steal and carry away from the person," &c., because the description did not charge him with any offense within the statute.

And so in this case. If the accused has committed any crime, it is probably that which is defined in chapter 508, section 88 of the act passed April 17, 1860: "Whenever any larceny shall be committed in said city and county, by stealing, taking and carrying away from the person of another, the offender may be punished as for grand larceny," &c. And the language of this section should have been used, that we could have arrived at a certainty as to whether this was or was not the crime committed, as the other section of the act refers to where the attempt is made to steal as a pickpocket, &c.

The commitment should also show whether the accused is

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charged with a felony or a misdemeanor. If it be for a felony, it must contain the special nature of the felony. (2 *Wils. R.*, 158, 159; 2 *Hale R.*, 122.) The crime should be specifically set forth for another reason, that if the party is brought before the court upon a *habeas corpus*, and no specific crime is alleged, or is so loosely set forth that the court cannot judge whether there is any reasonable ground for imprisonment, the party will be discharged. (2 *Hawk. P. C.*, ch. 16, § 16; 1 *Chit. Cr. L.*, 111.)

It appears to me, that upon these proceedings, which are brought in compliance of article 2, page 883, 3 Revised Statutes, 5th edition, on *habeas corpus*, that I am bound, under this commitment, to discharge the prisoner from custody, though I am aware that it has been held in 5 *Cow. R.*, 39, and in *East R.*, 157, that if the commitment be defective, the Supreme Court will discharge the prisoner *pro forma*, and remand him upon a special rule; yet I am convinced that this is a mere matter of discretion, and the court will look into all the facts of the case; and no person should be unlawfully deprived of liberty through the carelessness, ignorance or design of committing magistrates. For these reasons the prisoner must be discharged in this case, and an order entered accordingly.

A. Oakley Hall (District Attorney), for the People.

I. The writ should be quashed for want of jurisdiction.

1. The city judge at Chambers has no power to allow a writ of *habeas corpus*.

a. It is true the law of his official creation confers upon him all the *judicial* powers vested by law in the recorder. (*Laws of 1850*, ch. 205; and 1 *R. S.*, 5th ed., 397.)

b. The recorder exercised the duties of a *habeas corpus* commissioner, because, 1st (by 2 *R. S.*, original paging, 564, and § 37 of the *habeas corpus* provisions), application for the writ could be made to any officer authorized to perform the duties of a justice of the Supreme Court at Chambers; and 2d (by 2 *R. S.*, original paging, 281, § 35 of *General Provisions concerning certain judicial officers*), every recorder of a

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city was authorized, "by virtue of his office, to be a Supreme Court commissioner;" and 8d, a Supreme Court commissioner was given the duties of a Supreme Court justice at Chambers. (*Id.*, § 20.)

After July, 1847, the office of Supreme Court commissioner was abolished by the Constitution, art. 14, § 8.

The power, as a *habeas corpus* commissioner, of responding to the application for the writ, probably survived to the recorder. Or, in the language in *Renard v. Hargous* (2 Kern. R., 263), "the power was *continued*." But no analogy can connect the reasoning in the last named case, with an argument for the power claimed by the city judge, because, in the act reviewed by the court in *Renard v. Hargous*, the words, "*perform the same duties*," are additional to these, viz., "possess the same powers."

Moreover, in the statute affecting the case at bar, the noun "powers" is limited by the adjective "*judicial*." (See this topic, examined in the report, "*In re Powers of County Judges*," 3 How. Pr. R., p. 82.)

c. But the issuing of a writ of *habeas corpus* by an officer at Chambers is never a judicial act; and if it were sometimes one, nevertheless, the phrase *judicial powers*, in the act of 1850, does not include such issue by the city judge.

1. The issue of a writ of *habeas corpus* by a judge at Chambers is not a judicial, but a ministerial act. (*Per KENT, Yates v. Lansing*, 5 Johns. R., 282.)

"The writ *cannot be denied* where the granting of it is made a matter of imperative duty by the statute." (*Hurd on Habeas Corpus*, 225.)

KENT, in his Commentaries, draws the same distinction between act ministerial, as of *Chambers*, and act judicial, as of *banco*, consequent upon the extension by the Revised Statutes of the penal provision from *Chambers'* refusal which previously existed, to a *court* refusal. (1 *Kent*, 684; and *Hurd*, p. 226.)

2. The phrase "*judicial powers*," in the act of 1850, related to the powers of the recorder as judge of General or Special Sessions, and as a magistrate *quoad* justice of the peace.

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Bouvier defines "judicial power" as "authority vested in the judges.

A judge is an officer of a court during court hours.

The *habeas corpus* statute uses both of these words, viz., judge and officer.

When the recorder allows a writ, he allows it as an officer, and not as a judge.

In the familiar case of *Barry v. Mercein* (8 Paige, 55), the chancellor says: "It is not material to inquire whether the chancellor, in allowing the writ of *habeas corpus*, acts as a mere commissioner under the statute, or as a court proceeding, etc., etc," thus illustrating the distinction between officer and judge.

Section 102 of the *habeas corpus* provisions draws distinction between judge, commissioner, and officer.

See, also, section 4 of article 4 of chapter 315, Laws of 1844, respecting bail on *habeas corpus* in New York city.

It may be argued that the fourth section of the act of 1850 negatives the idea that the powers of the city judge are limited merely to the duties of the recorder as a judge of courts, because that section provides office accommodations for his attendance at all reasonable hours for the transaction of business, except when engaged in holding court.

That argument I answer thus: If the issuing of a writ of *habeas corpus* was the only possible business which the city judge could transact out of court, then the argument now met might, by implication, arise. But the city judge, as judge, must, concurrently with the recorder, have chambers at which to hear complaints as examining magistrate; to entertain applications for stays of proceedings on bills of exceptions; to settle bills of exceptions on hearing; to settle interrogatories, etc., etc., etc.

And it was for the purpose of transacting the above species of business that he required Chambers.

II. If the city judge had jurisdiction under the writ, he erred in holding the commitment defective.

1. The commitment showed that an examination was pending on charge of statutory crime, entitled larceny from the

person, and "stated with reasonable certainty." (*Bac. Abr., tit. Commitment E.*)

2. The paper was what is best known in criminal law as a remand, as distinguished from a *mittimus*. (1 *Archb. Cr. Pl.*, 36-41, *Waterman's ed.*)

3. The city judge omits to draw a distinction between a remand and a final commitment or *mittimus*, and he appears to reason on defects, as if the process was a record of *conviction*.

A remand is not a statutory, but a common law process. (*Archb., supra.*)

And a verbal remand for three days after warrant issued, has been held good. (*Id.*)

4. The recital of offense was as strong as that held to be good in a warrant in *Potter's Case* (note to *McLeod's Case*, 1 *Hill*, 399, middle of page, and p. 401, bottom of page), or, as in the cases collected in *Hurd on Habeas Corpus*, 376-383.

5. Will the court further examine the opinion by the light of the following cases:

"It is not necessary to allege the value of the property (*i. e.*, in the warrant); the only effect of omitting to do so is, that the offense would be deemed petit larceny, and therefore bailable before any magistrate of the county." (*Payne v. Barnes*, 5 *Barb. R.*, 465.)

"The warrant, though very limited, is sufficient, if it recite the subject of the section." (*Sleight v. Ogle*, 4 *E. D. Smith*, 445.)

In *ex parte Smith* (5 *Cow. R.*), the following remand was held sufficient by the Supreme Court, after arguments by Van Ness Yates and Attorney-General Talcott:

"POLICE OFFICE, CITY OF ALBANY.

"The gaoler will receive and safely keep for further examination, George W. Smith, who is charged with having been engaged in, or accessory to, a robbery of the U. S. mail.

"J. O. COLE, Justice of the Peace."

During the attorney-general's argument, he said (p. 275) "This commitment is merely for further examination. No

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formality is necessary in such a commitment. It may be by a verbal warrant; no crime need be specified. The order in question is in the usual form, and is sanctioned by authorities," &c.

III. It was the duty of the city judge, although the commitment was irregular, to have bailed, and not have discharged. (See 58, *Habeas Corpus Provisions*.)

C. S. Spencer, for the prisoner.

I. The commitment is defective. It should have stated that some article, the subject of larceny, was taken. It should have stated some *value*. It should have stated *when*, to show that it was within the statute of limitation for the offense, and *where*, to show that the court had jurisdiction. This is not stating the cause of commitment "with reasonable certainty." (*Rex v. Remnant*, 5 Term R., 169; 2 Leach, 588; 2 Wils., 158, 159; 2 Hale, 122; 2 Hawk. P. C., ch. 16, § 16; 1 Chit. Crim. Law, 111.)

In the administration of criminal law, the forms of justice ought to be rigidly complied with, and no party charged with an offense should be held by virtue of a commitment, that does not contain one of the requirements of the law.

II. It was clearly a matter of discretion whether the judge would discharge the prisoner *pro forma*, and then remand or take bail. Strictly it was his duty, in the language of the statute (3 R. S., 5th ed., p. 895, § 103), "*to determine whether the party is lawfully committed.*" He did determine the question upon inspection of the commitment, which was all there was before him.

The prisoner had been in prison from the 13th to the 17th day of February, 1863, before the writ was issued upon a temporary commitment. This was an unreasonable detention. The prisoner was entitled to a speedy examination. It was the duty of the judge before whom the prisoner was brought, to take into consideration this fact exercising his discretion. The statute points out the duty of the officer before whom the prisoner is brought; its language is:

"If no legal cause be shown for such imprisonment or

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restraint, a further continuation thereof, such court or officers shall discharge such party from the custody or restraint under which he is held."

The cases in which the court or officer shall *remand*, are also pointed out by the statute, and are not left to *arbitrary discretion*. They are as follows:

"It shall be the duty of the court or officer forthwith to remand such party, if it shall appear that he is detained in custody, either,

"1. By virtue of process issued by any court or judge of the United States Courts, in a case where such court or judge has exclusive jurisdiction; or,

"2. By virtue of the final judgment or decree of any competent court of civil or criminal jurisdiction, or of any execution issued upon such judgment or decree; or,

"3. For any contempt especially and plainly charged in the commitment, by some court, officer or body having authority to commit for the contempt so charged; and,

"4. That the time during which such party may be legally detained has not expired." (5th ed. R. S., vol. 3, p. 887, §§ 54, 55.)

Certainly the officer could not have *remanded where* no legal cause for detention appeared on the face of the commitment. It was his duty, according to the letter and spirit of the statute to discharge.

The cases cited by the prosecution do not apply to the facts as presented in this case. The case of *Payne v. Barnes* (5 Barb. R., 465), does not decide the question here. The court will see, by examining the case, that the *time*, the *place* and the *amount* were stated. In the commitment under consideration, none of these requisites are stated.

In the case of *Sleight v. Ogle* (4 E. D. Smith R.), the question arose, as in the last case, in a civil suit, and the question here presented was not in issue; for in the case of *Sleight v. Ogle*, it appears that a complaint in due form was made before the magistrate who issued the warrant, and the judge who delivered the opinion says: "This was, *prima facie*, sufficient to authorize the arrest."

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The case in 5 *Cow. R. (ex parte Smith)*, is not applicable to the question here. He was a fugitive from justice; the offense one against the laws of the United States. The counsel for the prisoner *did not raise the question as to the validity of the commitment*, neither did the court allude in any manner to that question.

The inferences to be drawn from the case are in favor of the point claimed by the prisoner here.

The city judge has power to grant writs of *habeas corpus*.

All judicial powers vested by law in the recorder of the city of New York, are hereby conferred upon such city judge; and said city judge shall, concurrently with said recorder, perform and discharge all judicial duties imposed upon such recorder. (*Laws 1850, ch. 205, § 3, and 1 R. S., 5th ed., p. 397, § 64.*)

Every county judge, within the county in which he shall have been elected, shall have power, and it shall be his duty, to perform all such duties, and to *do all such acts*, when not holding a County Court, as might have been done or performed by the laws in force on the 12th of May, 1847, by the judges of the *Court of Common Pleas*, or by any one or more of them, at Chambers or otherwise, when not holding court, or by any other judge being of the degree of counselor of the Supreme Court, and acting as a Supreme Court commissioner. (*3 R. S., 5th ed., p. 306, § 82.*)

The judges of the Court of Common Pleas for the city and county of New York, elected pursuant to chapter 255 of the Laws of 1847, and the mayor, recorder and aldermen of the said city *shall be judges* of the Court of Common Pleas of the said city and county. (*3 R. S., 5th ed., 307, § 41.*)

Common Pleas may be held by recorder alone. (*Id., § 42.*)

• The judges of the Court of Common Pleas are authorized to perform the duties of a justice of the Supreme Court at Chambers. (*Laws 1847, p. 281, § 7; 1 Park. Cr. R., 188.*)

The same power is given to the judges of the Court of Common Pleas, in and for the city and county of New York at Chambers, as is given by any law of this State to the justices

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of the Superior Court of said city (3 R. S., 809, 5th ed.), and a judge of the Superior Court at Chambers, sitting as a Supreme Court commissioner, has power to issue a writ of *habeas corpus*. (1 Duer R., 709; 2 R. S., 281, § 88.)

Recorders of cities and judges of the county courts, being of the degree of counselor-at-law, may perform the duties of a justice of the Supreme Court at Chambers. (2 R. S., 281, § 82; *Opinion of Justice WILLARD*, 3 How., Pr. R., 32; *Op. of Jus. HARRIS*, 3 Id., 40; *Op. of Jus. BAROULO*, 3 Id., 172.)

In which latter case Justice BAROULO held:

"I concur fully with those of my brethren who hold that county judges are clothed with the power of performing certain duties of a justice of this court at Chambers. This power is given to those officers by the new judiciary act, if it is possible for legislative enactment to do so, &c., &c."

The city judge of the city of New York has the powers of a former Supreme Court commissioner. (*Avery's Case*, 6 Abb. R., 146.)

The issue of a writ of *habeas corpus* by a judge at Chambers is not a mere ministerial act. It involves the exercise of judicial discretion.

The writ of *habeas corpus* is a prerogative writ, not ministerially issuable, i. e., not issuable of course; and yet it is a writ of right on a proper foundation, being made out by proof. (3 Hill R., 649, Note pl. 2; see 16 Barb. R., 862.)

BARNARD J. There are two questions presented in this case. One, whether the city judge has power to issue the writ of *habeas corpus*, and the other whether, if he has that power, he has made a correct decision in discharging the prisoner.

The power depends upon the construction to be given to the words "judicial powers," contained in the act of 1850, creating the office of city judge. The portion of the act which confers on the city judge his powers and defines his duties is as follows: "All judicial powers vested by law in the recorder of the city of New York, are hereby conferred on such city judge, and said city judge shall, concurrently with

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said recorder, perform and discharge all judicial duties imposed on such recorder."

Now, the only power which the recorder has to issue a *habeas corpus* is derived from the statute making him a Supreme Court commissioner. (2 R. S., p. 281, § 35.) By 2 Revised Statutes (p. 281, § 20), a Supreme Court commissioner had the duties of a justice of the Supreme Court at Chambers, under certain limitations, which do not affect this question. By the *habeas corpus* provisions, application for the writ might be made to any officer authorized to perform the duties of a justice of the Supreme Court at Chambers. (2 R. S., p. 564, § 37.) Shortly, thus: Any officer authorized to perform the duties of a justice of the Supreme Court at Chambers might issue the writ; a Supreme Court commissioner was authorized to perform such duties; the recorder was a Supreme Court commissioner, and, by virtue of being such, might issue the writ. It follows that the power and authority of the recorder is precisely that of a Supreme Court judge at Chambers.

It will now be considered whether there is any distinction between the term "Chambers," and the term "vacation." They are, in fact, convertible terms. Everything that can be done at Chambers can be done in vacation; and, on the other hand, everything that can be done in vacation can be done at Chambers. There can be no distinction made where the powers and duties are identically the same. The power of the recorder to issue a *habeas corpus* is, consequently, the same as that of a Supreme Court judge in vacation.

In the year 1810, Chief Justice KENT, in the case of *Yates v. Lansing* (5 Johns. R., 282), enunciated the doctrine that the allowance of the writ of *habeas corpus* in vacation is not a judicial act, but a ministerial one. If this doctrine is sound, it disposes of the case. Chief Justice KENT, at the time he enunciated the doctrine, had in view that one of the *habeas corpus* provisions which imposed a penalty for refusing to issue the writ; and he appears to base the doctrine on the principle that when the statute imposes the performance of an act in favor of a party upon a petition being presented drawn in conform-

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ity with specific directions contained in the statute itself, and prescribes a penalty in favor of the party for a refusal to perform the act, then the act to be done is ministerial and not judicial. It is the very nature of a judicial power that those in whom it may be vested shall decide and act according to their honest and fair judgment without being liable to suitors or private parties for any error in their judgment; thus giving them free and uncontrolled exercise of judgment. If, consequently, in the exercise of a judicial power, they refuse to perform an act, or commit any error in its performance, they are completely protected from being called to account by a suitor or private party. If the penalty given by the *habeas corpus* act was only to attach in cases where the writ was refused when it was legally applied for in the judgment of the officer to whom the application should be made, then the power to issue the writ might be a judicial one; since then there would be no restriction on the exercise of the officer's judgment. But the provision would not then answer the end intended, as there could not, in any case, be a recovery of the penalty. The penalty, however, is imposed for refusing to grant the writ when legally applied for. If, then, the officer should make a mistake as to the writ being legally applied for, he would be liable to the penalty, even though the mistake were honestly made. The statute, in order to protect the officer, has clearly defined the prerequisites in order to obtain the writ. It prescribes a petition, and defines with particularity its contents, and prescribes what persons are prohibited from prosecuting the writ, and then declares that the writ shall be granted unless it appears from the petition or the documents accompanying it that the party applying is among those prohibited from prosecuting.

The provisions of the statute are so framed as to render it scarcely within the bounds of possibility that the officer could make any mistake as to whether the prerequisites had been complied with; and then to make him liable, in all cases, to the penalty for a refusal to issue the writ, unless he could, when sued, make it appear, to the satisfaction of the court before

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which the case should be tried, that the writ had not been legally applied for. The provisions of the act thus deprive the officer of that free exercise of judgment which is an essential to a judicial power. The power in question must necessarily be ministerial. True, there is a species of judgment required in seeing whether the petition contains the matters prescribed by the statute. But it is the same species of judgment which almost every ministerial power calls for. It is the same kind of judgment which the register of deeds is required to exercise in ascertaining whether an acknowledgment is in conformity with the statute. It will scarcely be contended that the duty imposed on the register, of seeing that every conveyance has been duly proved or acknowledged, vests in him a judicial power.

But this species of judgment is not that free and untrammelled exercise of judgment which appertains and is essential to a judicial power. Nor does the fact that judges and courts are empowered to issue the writ necessarily make it a judicial power; for there can be no doubt that the performance of an act, clearly ministerial in itself, may be imposed on a judge. The fact that a judge is selected as the minister to perform a ministerial act cannot change the nature of the act: that will remain the same as if a coroner or constable had been selected. There is no reason for dissenting from the principle laid down by Chief Justice KENT.

Having thus come to the conclusion that the power of the recorder to issue a *habeas corpus* is ministerial, it follows that it does not pass to the city judge under the term "judicial powers."

Upon the other question, the commitment is in the form sanctioned by authority, and is, on principle, amply sufficient.

The discharge must be vacated, and the prisoner remanded on the temporary commitment.

CLERKE, J. The act of 1850 (*Laws of 1850, p. 388, § 3*), creating the office of city judge in the city and county of New York, confers upon this officer all judicial powers vested by

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law in the recorder of the city of New York; "and," it proceeds to say, "the said city judge shall, concurrently with said recorder, perform and discharge all *judicial* duties imposed upon said recorder." I will not now inquire whether this act confers upon the city judge any other judicial powers than those belonging to the Court of General and Special Sessions, such as the power to hold a Court of Common Pleas, &c. But, of course, there can be no question that the city judge shares no other powers with the recorder than those which are, in the strictest sense of the term, judicial.

Is the power to issue a writ of *habeas corpus* to inquire into the cause of a person's commitment, detention or restraint of liberty, a judicial power? Undoubtedly, it is a power which is intimately connected with the administration of justice, and so are all the various powers possessed and exercised by the numerous officers of every court of justice. The issuing of many writs and processes is vested in clerks and prothonotaries; and the power is purely ministerial. No power is judicial that does not imply discretion—the right to grant or refuse, according to what the officer deems right or just and in conformity to the laws of the land. But the writ of *habeas corpus*, whether applied for in or out of court, has now become a writ of right; and, "if any court or officer, authorized to grant writs of *habeas corpus*, shall refuse to grant such writ, when legally applied for, every member of such court who shall have assented to such refusal, and every officer, shall severally forfeit to the party aggrieved one thousand dollars." (3 R. S., 5th ed., p. 885, § 46.) As the law stood before the revision of 1830, when the application was made to the court, the members were not liable to this penalty: it attached only to those judges who refused to grant the writ in "the vacation time." (1 R. L., p. 355, § 4.) Consequently, in *Yates v. Lansing* (5 Johns. R., 282), the court decided that, when the application was made to the court, they acted judicially, and were not liable to the penalty; but when it was made to a judge in vacation, or out of court, he acted ministerially, and was liable. KENT, Ch. J., says: "The penalty to which the chancellor and judges are

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liable, is mentioned in the 4th section of the act; and that is given against them by name, and only for their refusal, in the vacation time, to allow a writ of *habeas corpus*, when duly applied for. The chancellor and judges may refuse such a writ, at their discretion, if applied for in term time, and the penalty will not attach. It is only when they refuse, in a mere ministerial capacity, to allow a writ, that they are made responsible. *The allowance of a writ in vacation is not a judicial act.*" So that, if the penalty was not extended to the court by the revisers of 1880, still the act of the city judge in issuing a writ of *habeas corpus* would not be a judicial act: it would be purely ministerial. At no time since the act of 1813 could a judge out of court refuse the writ; and, therefore, in allowing it, he acted in a mere ministerial capacity.

The act of 1850, creating the office of city judge, having conferred on him only the judicial powers vested in the recorder, he cannot exercise powers that are not judicial, and which are purely ministerial. In doing so, he attempts to stretch his authority beyond the limits which the statute prescribes.

The proceedings before the city judge should be set aside, and the relator, Louisa Nash, should be remanded on the temporary commitment.

Discharge vacated, and prisoner remanded.

SUPREME COURT. New York General Term, May, 1863.
Sutherland, Clarke and Barnard, Justices.

THE PEOPLE v. JULIUS J. SMITH.

Form of an indictment for obtaining money by false pretenses.

It is no defense to a charge of obtaining money by false pretenses, that the person from whom the money was obtained by the prisoner, was, at the time, indebted to the prisoner to an amount equal to the sum obtained by the false representation, and that it was the intention of the prisoner to apply such money on such debt. SUTHERLAND, J., dissented.

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The following indictment for obtaining money by false pretenses was found against the prisoner.

City and County of New York, ss :

The Jurors of The People of the State of New York, in and for the body of the city and county of New York, upon their oath, present:

That Julius J. Smith, late of the first ward of the city of New York, in the county of New York aforesaid, well knowing that Rachel Stoesser, hereinafter mentioned, was then and there a customer, and in the habit of dealing with the firm of J. Riegelman & Deffaa, dealers in flour, doing business in said city, on the twenty-eighth day of October, in the year of our Lord one thousand eight hundred and sixty-two, at the ward, city and county aforesaid, with force and arms, on the day and year last aforesaid, with intent feloniously to cheat and defraud said Rachel, did then and there feloniously, unlawfully, knowingly and designedly, falsely pretend and represent to said Rachel, that he, the said Julius, was then and there a salesman and agent for the said firm of J. Riegelman & Deffaa, and that he, the said Julius, had then and there procured to be sent to said Rachel by said firm of J. Riegelman & Deffaa, ten barrels of flour and one bag of meal; and that he, the said Julius, had then and there full power and authority to collect and receive the price of said flour and meal from the said Rachel. And the said Rachel, then and there believing the said false pretenses and representations so made as aforesaid, by the said Julius, and being deceived thereby, was induced, by reason of the false pretenses and representations so made as aforesaid, to deliver and did then and there deliver to the said Julius the sum of eighty-two dollars and seventy cents in money, of the value of eighty-two dollars and seventy cents of the proper moneys, valuable things, goods, chattels, personal property and effects of the said Rachel, and the said Julius did then and there designedly receive and obtain the said sum in money of the value aforesaid of the said Rachel, of the proper moneys, valuable things, goods, chattels, per-

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sonal property and effects of the said Rachel by means of the false pretenses and representations aforesaid, and with intent feloniously to cheat and defraud the said Rachel of the said sum in money of the value aforesaid.

Whereas, in truth and in fact, the said Julius was not then and there a salesman and agent for the said firm of J. Riegelman & Deffaa and had not then and there procured to be sent to said Rachel by the said firm of J. Riegelman & Deffaa, ten barrels of flour and one bag of meal; and whereas, in truth and in fact, he, the said Julius, had not then and there any power and authority to collect and receive the price of said flour and meal from the said Rachel. And whereas, in fact, and in truth, the pretenses and representations so made as aforesaid by the said Julius to the said Rachel, were in all respects utterly false and untrue, to wit, on the day and year last aforesaid, at the ward, city and county aforesaid. And whereas, in fact and in truth, the said Julius well knew the said pretenses and representations, so by him made as aforesaid to the said Rachel, to be utterly false and untrue at the time of making the same.

And so the jurors aforesaid, upon their oath aforesaid, do say, that the said Julius J. Smith, by means of the false pretenses and representations aforesaid, on the day and year aforesaid, at the ward, city and county aforesaid, feloniously, unlawfully, falsely, knowingly and designedly, did receive and obtain from the said Rachel the sum in money, of the value aforesaid of the proper moneys, valuable things, goods, chattels, personal property and effects of the said Rachel, with intent feloniously to cheat and defraud her of the same, against the form of the statute in such case made and provided, and against the peace of the People of the State of New York and their dignity.

A. OAKLEY HALL, *District Attorney.*

To this indictment, a plea of not guilty was put in, and the issue so joined came on to be tried at the Court of General Sessions of the Peace in the city of New York, before JOHN T. HOFFMAN, recorder, in December, 1862.

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Rachel Stoesser, the complainant, testified: That she was engaged in carrying on the business of a baker in Delancy street, in the city of New York, on her own account and with her own means, in the absence of her husband, who had left her; that on the 28th October, 1863, the prisoner called at her place of business and sold her ten barrels of flour and one bag of Indian meal, and said he would send the flour up the same evening; that the prisoner was, at the time, clerk or salesman for Riegelman & Deffaa; that between four and five o'clock on the afternoon of the same day, the prisoner again came there and asked her if the flour had come, and she answered "no;" that he then said the carman left the store with him, and had the flour to bring to her, and was coming to her shop with it, and wanted the pay; that she then paid the prisoner \$82.75 for the flour, expecting the flour would come soon; that he gave her a receipt for the money; that the flour did not come that night, and never came; that next day she went down to Riegelman's and asked why the flour did not come, and the bookkeeper told her no flour had been ordered for her.

On her *cross-examination*, she stated, among other things, that when she went down to Riegelman's she saw Mr. Riegelman and a clerk, and he said, "I am sorry such a thing has happened to you; so long as we have not the money we cannot send you the flour;" that she had never dealt with Riegelman directly, but always through the prisoner, Smith, who said he was clerk and salesman for Riegelman; that she had previously purchased flour from Riegelman, through Smith, four times; that when she first bought of him, he told her her husband owed him over \$100, and she said to him, "if my husband owes you anything and should not come back, I would pay him \$5 at a time if I could spare it."

The witness also testified that she had paid Riegelman & Deffaa for all the flour she had previously had of them.

On further *direct examination*, she testified that prisoner said the flour had started from the store of Riegelman & Deffaa, 315 Washington street, when he, prisoner, left the store to

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come there, and that he was their clerk; that she had been in business on her own account and with her own capital about six years; that her name is Rachel Stoesser, and her husband's Frederick Stoesser.

Defendant's counsel offered to show that Frederick Stoesser was insolvent, and that the ownership of the store had been frequently transferred by him to the wife, and again by her transferred to him, by conveyances fraudulent as to creditors.

The court refused to permit such testimony to be given, to which refusal counsel for defendant excepted.

John Riegelman was then called as a witness on behalf of the prosecution, and testified as follows:

Q. You are in business in this city? A. Yes, sir.

Q. What is your firm? A. John Riegelman & Deffaa.

Q. Where did you carry on your business? A. 315 Washington street.

Q. Do you know the prisoner at the bar? A. Yes.

Q. Do you know Mrs. Stoesser? A. Only since this matter has gone on.

Q. State whether Smith sent from your store, on or about the 20th of October, any flour for her? A. I do not know anything about it.

Q. Did any flour ever go from your store? A. I don't know anything about this matter.

Q. Don't you know whether any flour was sent from your store to this woman on the 21st of October? A. I cannot tell; I was not there; I am very seldom in the store.

Q. Did you see this woman when she called next day? A. I did not.

Q. Did you ever see her at all? A. The first time I have seen her was in Essex market.

Q. Was he a clerk in your store? A. He is a salesman on his own account.

Q. Was he your salesman? A. Yes.

Q. When did he become your salesman? A. About six months ago.

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Q. Under a stated salary? A. No, sir.

Q. State what the arrangement is. A. I give him the flour for so much; he sells on his own account, and has to pay for it.

Q. He has an arrangement with you? A. Yes, sir; he must pay for it.

Q. That's what you mean by being your clerk? A. Yes, sir.

Q. Do you know flour that's sent from your store? A. I do not.

Q. Who has charge of that branch of the business? A. Our bookkeeper (Rudolph Cameron) and partner.

Cross-examination:

Q. That is the blotter of Riegelman & Deffaa (showing witness a book)? A. Yes, sir.

Q. That last entry on the page is in Smith's handwriting? A. I ain't sure of it; I guess our bookkeeper would know.

Q. When Smith bought flour of you, to whom did you look for pay? A. To Smith.

Q. You did not look to Mrs. Stoesser at all? A. No, sir; never do.

By the court: Instead of being your salesman, he bought flour of you? A. Yes, sir.

By counsel for defendant: He had full power to receive the money? A. Yes, sir.

By district attorney: Did you sell and charge it to Smith, and look to him for pay? A. Yes, sir,

By counsel for defendant: He has a right to deliver any flour he likes from your store? A. Yes, sir.

By a juror: Are these your bills (showing bills)? A. They are.

Rudolph Cameron was then called as a witness on behalf of the prosecution, and after being duly sworn, testified as follows:

Q. Are you in the employ of the firm of Riegelman & Deffaa? A. Yes, sir.

Q. Were you on the 28th of October last? A. I was.

Q. What is your business there? A. Bookkeeper.

Q. Do you know every sale made? A. I know in the books, but not in the other book.

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Q. You take an account of flour shipped from your store?

A. Yes, sir.

Q. And to whom it is shipped? A. Yes.

Q. Do you know whether, on that day, flour was sent to Mrs. Stoesser? A. Some ordered at 32 Delancey street, but it was not sent.

Q. Was it not ever sent? A. No; not this lot.

Cross-examination:

Q. You say this flour was ordered, but not sent; state what steps were taken. A. Smith came in the evening, and said he did not want to send it; he said he had got some of his old debts.

Q. What had been done towards sending this flour; had it been picked out? A. It was.

By the court: Had this particular flour been ordered? A. Yes, sir.

By counsel for defendant: These ten barrels of flour had been picked out? A. Yes, sir.

Q. What directions had been given with regard to sending this flour? A. 32 Delancey street.

Q. How was it to be sent? A. I should send it that afternoon.

Q. By the cartman? A. Yes, sir.

Q. Was the cartman there at the time it was ordered? A. No; I guess he was over in Brooklyn; I ain't quite sure.

Q. What time did he come back? A. Pretty near night.

Q. Had Smith got back then? A. I guess Smith came back between four and five o'clock.

Q. What did he say? A. He crossed the bill and said, "Don't send the flour until I get some of my old debts."

Q. Look at those marks across the face of the order, and see if these were the marks he made at the time? A. Yes, that is his handwriting.

Q. Did he state what had happened? A. Not at that time, but the day after.

Q. Was any one present besides you and Smith? A. Mr. Deffaa.

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By a juror: Did you make out the bill? *A.* No.

Q. Who made it out? *A.* That is Smith's handwriting.

The testimony for the prosecution was here closed.

Christian Spearenburger was called as a witness on behalf of the defense, and after being duly sworn, testified as follows:

Q. Where do you live, and what is your business? *A.* I live 63 Market street, and am a cartman.

Q. Have you been in the habit of delivering any flour for Julius J. Smith to Mr. and Mrs. Stoesser? *A.* I have.

Q. From what time to what time? *A.* From the 26th of December, 1861. I have taken them the first load up to about, I think it was March.

Q. To whom was the flour delivered? *A.* To Mrs. R. Stoesser, 82 Delancey street.

Q. How many times do you think during that period you delivered flour to her?

By court: "Concede that she owed him money. A man can't collect a debt by false pretenses."

Philip Deffaa, was then called as a witness on behalf of the defense, and after being duly sworn, testified as follows:

Q. You are a member of the firm of Riegelman & Deffaa?
A. Yes, sir.

Q. Do you know Smith at the bar? *A.* Yes, sir.

Q. On the 28th of October, was he employed by you?
A. No, sir; he buys the flour of us and sells on his own hook.

Q. Did his customers come near you, or did they deal with him? *A.* No. They dealt with him; he could pick out the flour that he wanted; his price is made; we have a certain profit, and he sells the flour.

Q. He is authorized to sell flour from your store? *A.* He can sell flour from our store when he buys it.

Q. He didn't have to pay the money for it, in the first place, before he delivered it? *A.* No, sir.

Q. Do you remember his ordering flour for Mrs. Stoesser?
A. He did; a load of flour; I believe it was the day before the lady came to the store.

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Q. Was this flour picked out, so that it could be sent?

A. Yes, it was on the book.

Q. What was the custom with regard to that flour?

A. Whether Smith would be there or not, the flour would be sent. We had no time to send it. Smith came in and said: "Have you sent this flour?" I says, "I have not." "Very good," said he; "I won't send it." The woman made a statement to me about other flour dealers. I did not take particular notice. I let it go so. The next day or two days after, this old lady came in and asked me whether Smith ordered the flour. I told her "no." I did not want to interfere with the lady. I did not know anything about it, and the flour was not sent. We left the flour in the store.

Q. What did the lady say? A. She said they owed Smith money, when her husband was there; her husband left her and went away and she cannot pay it—that was in the door of the store.

Q. What did you say to Smith at the time he ordered the flour to be stopped?

The district attorney objected to this question. The court sustained the objection and refused to allow the question to be answered; to which decision counsel for defendant excepted.

Counsel for defendant offered to give evidence as to what transpired between the defendant and the witness Deffaa before defendant stopped the flour. The court refused to allow such evidence to be given; to which decision counsel for defendant excepted.

Q. Was Smith at this time authorized to receipt your bills?

A. I do not know; Mr. Riegelman made this arrangement with Smith.

Q. Is Smith still with you under the same arrangement?

A. Yes, he is there to-day.

Cross-examination:

Q. The flour never left the store, did it? A. No, sir.

By the court: Q. Never was put on the cart? A. No, sir; if he got back a little later, it would have been sent.

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By a juror: Q. Look at all these bills; do you know these bills? A. I do, sir.

Q. Did you authorize Smith to make out that bill? A. I find Mr Riegelman made the contract with Smith in the first place.

Q. Do you know that handwriting (showing a paper)? A. I do not; it must be Smith's; it ain't our bookkeeper's.

Q. Do you know whose it is? A. I think it is Smith's.

Q. Did you authorize Smith to have any of your billheads to make out bills on? A. I do not.

Q. Do you know whether he has any authority from your partner to do so? A. I think he has, for he would not allow him to do so if he had not; that is my opinion.

By counsel for defendant: Q. Look at that entry; do you know anything about that delivery of flour?

Objected to by the district attorney.

Counsel for defendant proposed to show that the defendant had authority to act as clerk and salesman.

Witness: He has authority to send flour, as a matter of course.

By the court: Q. You sold him all the flour he wanted? A. Yes, sir.

Q. Is he in your store most of the time? A. Sometimes two or three hours; he generally comes there every day; when the lady came in that day he was not there.

Other witnesses were examined on the part of the defense, and after the counsel had addressed the jury,

The court charged the jury as follows, viz.:

By the laws of this State, every person who, with intent to cheat or defraud another, designedly, by any false pretense, obtains from such other any money, personal property or valuable thing, is guilty of a crime, and liable to punishment. In order to convict any one of "obtaining goods by false pretenses," the jury must be satisfied, upon the evidence, that the party accused with intent to cheat and defraud, has made some false representations of some matter of fact to induce the person to whom it is made to part with some property or valuable

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thing. The representation must be such as would be likely to be believed and acted on by a person of ordinary caution; and such person must have parted with his property upon the belief that the representation was true. It is not necessary that all the pretenses charged in the indictment should be proven to be false. It is sufficient if any one of them is proven to be false, if such pretense induced or had a material effect in inducing the prosecutor to part with his property.

To the last proposition the defendant's counsel excepted.

The court further charged the jury: That applying these propositions to the present case, if the jury were, upon the evidence, satisfied beyond all reasonable doubt that the defendant, with intent to deceive and defraud Mrs. Stoesser, falsely represented to her that he was the clerk of Riegelman & Deffaa, and that the flour which he had in the morning, as such clerk, sold and was to deliver to her, had left the store of Riegelman & Deffaa on the cart at the same time he had left, and was then on its way to her store, and that she, relying upon the truth of such representations, at his request gave to him the money for the purpose of paying for the flour, they might convict the defendant.

To which proposition the defendant's counsel excepted.

The court further charged that it was not necessary, in order to justify such conviction, that it should appear that all of such representations were false. It was enough if the falsity of either one of them was established, if each one had a material effect in inducing Mrs. Stoesser to part with her money.

To which proposition defendant's counsel excepted.

The counsel for defendant requested the court to charge the jury, that upon evidence in the case, the defendant was entitled to an acquittal.

The court refused so to charge, and to such refusal defendant's counsel excepted.

The counsel for defendant also requested the court to charge the jury, that a false representation, by which a man may be cheated into doing his duty, is not the subject of punishment under an indictment like this.

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The court charged that this, as an abstract proposition, was true, and that it had been decided in this State that where one held the promissory note of another, which was due and unpaid, and falsely represented to the debtor that such note was lost or burned, and thereby induced him to pay the same, that such false representation did not render him liable to punishment under the statute relating to obtaining goods by false pretenses.

And upon this point the court further charged, that there was a difference between the case so decided and the case then on trial; that the defendant, if he made the false pretenses before mentioned, and thereby induced the prosecutrix to give him the money for the flour, could not shield himself from criminal responsibility by showing that his secret intention, not communicated to her, was to apply the money to the payment of a debt due or claimed to be due from her to him; that if she had parted with the money to pay the debt, he could not be convicted, no matter how false the representation which induced her to do it; but it was not so if the money was parted with for another purpose, viz., to pay for the flour which he represented was then on its way to her store.

To all which defendant's counsel excepted.

Upon this point, the court, illustrating the same, added as follows: "If the foreman of this jury owed me a debt, and I, being on intimate relations with his family, went to him and falsely told him that his wife had requested me to come to him and ask him to give me for her a certain sum of money, which she wanted to use, and he gave me the money, I could not shield myself from responsibility by showing that it was a trick of mine by which I intended only to get money enough in my hands to pay me what was claimed by me to be justly due me. It would be different if I persuaded him to pay me my debt upon some false statement made by me to him to induce him to do so.

To all which defendant's counsel excepted.

The defendant's counsel also requested the court to charge, that if the jury believed, from the evidence, that defendant

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was salesman and agent for Riegelman & Deffaa, and had authority from them to collect and receive money for the ten barrels of flour and one bag of meal, the prisoner must be acquitted.

The court refused so to charge, and defendant's counsel excepted.

The defendant's counsel also requested the court to charge, that if any of the pretenses alleged in the indictment to be false were, in fact, true, the prisoner must be acquitted.

The court refused so to charge, and defendant's counsel excepted.

The defendant's counsel also requested the court to charge, that if the jury find that the prisoner believed any one of such pretenses was true, that he must be acquitted.

The court refused so to charge, and defendant's counsel excepted.

The defendant's counsel also requested the court to charge, that to justify a conviction, the jury must be satisfied, from the case, not only that the pretenses were all untrue, but that the prisoner knew they were all untrue.

The court refused so to charge, and defendant's counsel excepted.

The defendant's counsel also requested the court to charge, that if the prisoner believed that the pretenses by which the complainant was deceived were true, he must be acquitted.

Upon this point the court refused so to charge otherwise than had already been charged, and defendant's counsel excepted.

Defendant's counsel also requested the court to charge, that if the jury believed that Mrs. Stroesser owed Smith \$82.75 at the time he obtained the money, he should be acquitted.

The court refused so to charge, and defendant's counsel excepted.

Defendant's counsel also requested the court to charge, that if the jury believed the testimony of Philip Deffaa, they should acquit the prisoner.

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The court refused so to charge, and defendant's counsel excepted.

Defendant's counsel also requested the court to charge, that if the jury believed the testimony of Randolph Cameron, they should acquit the prisoner.

The court refused so to charge, and defendant's counsel excepted.

Defendant's counsel also requested the court to charge the jury: 1st. That if they believed Smith supposed he was doing a lawful act, he should be acquitted; and, 2d. That if he, by his actions, was endeavoring to collect from Mrs. Stoesser what he supposed to be a just debt, he was entitled to an acquittal.

Upon the several propositions the court refused to charge other than had already been charged, and to which refusal on each proposition defendant's counsel excepted.

The jury rendered a verdict of guilty.

The proceedings were then removed by *certiorari* into this court, for review.

Henry L. Clinton, for the prisoner.

I. The court below erred in charging the jury "that the defendant, if he made the false pretenses before mentioned, and thereby induced the prosecutrix to give him the money for the flour, could not shield himself from criminal responsibility by showing that his secret intention, not communicated to her, was to apply the money to the payment of a debt due, or claimed to be due, from her to him. That if she (prosecutrix) had parted with the money to pay the debt, he could not be convicted, no matter how false the representation which induced her to do it; but it was not so, if the money was parted with for another purpose, viz., to pay for the flour, which he represented was then on the way to her store."

II. The court below erred in the following portion of its charge to the jury: Upon this point (as stated in Point I), the court, illustrating the same, added as follows: "If the foreman of this jury owed me a debt, and I, being on intimate relations

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with his family, went to him and falsely told him that his wife had requested me to come to him and ask him to give me for her a certain sum of money which she wanted to use, and he gave me the money, I could not shield myself from responsibility by showing that it was a trick of mine, by which I intended only to get money enough in my hands to pay me what was claimed by me to be justly due me."

III. The court below erred in refusing to charge, as requested by defendant's counsel, "that if the jury believed that Mrs. Stoesser owed Smith \$82.70 at the time he obtained the money, he should be acquitted."

IV. The court below erred in refusing to charge as requested by defendant's counsel, "that if he (defendant), by his actions, was endeavoring to collect from Mrs. Stoesser what he supposed to be a just debt, he was entitled to an acquittal."

Points I, II, III, IV, may be discussed together, as the errors of the court below, specified in these points, were based upon a misapprehension of a single principle of law, to wit: That if defendant, in the representations to the prosecutrix, alleged to have been made by him to her, intended merely to collect a debt due him, or which he believed to be due him, instead of designing to cheat and defraud her, he was not guilty of the offense of obtaining money by false pretenses, even if (which was not the case) his representations as to facts were designedly false.

The language of the statute is, "Every person who, with intent to cheat or defraud another (not with intent to collect his own debt), shall designedly" * * * "by any false pretense" * * * "obtain from any person, any money," &c. It is the intent to cheat and defraud which forms the chief ingredient of the offense. Without this intent there can be no offense. It is not enough if the prosecutor should be incidentally defrauded (which was not the case with the prosecutrix in the case at bar). Roscoe, in his Criminal Evidence, page 478, well observes: "The primary intent must be to cheat and defraud. Thus, where the prisoner was indicted for having procured from the overseer of a parish, from which he

received parochial relief, a pair of shoes by falsely pretending that he could not go to work because he had no shoes, when he had really a sufficient pair of shoes; and it appeared in evidence, that on the overseer bidding him go to work, he said he could not because he had no shoes, upon which the overseer supplied him with a pair of shoes, whereas the prisoner had a pair before; the prisoner being convicted, the case was considered by the judges, who held that it was not within the act (80 *Geo. III, ch. 24*), the statement made by the prisoner being rather a false excuse for not working, than a false pretense to obtain goods." (*Wakeling's Case, Russ. & Ry., 504.*)

A. owed B. a debt, of which B. could not obtain payment. C., a servant of B., went to A.'s wife and got ten sacks of malt from her, saying that B. had bought them of A., which he knew to be false, and took the malt to his master in order to enable him to pay himself; it was held by COLERIDGE, J., that if C. did not intend to defraud A., but only to put it in his master's power to compel A. to pay him a just debt, he could not be convicted of obtaining the malt by false pretenses. (*Williams' Case, 7 Car. & Payne R., 354.*)

The above case cited by Roscoe (*p. 475*), with approbation, and approved by the Supreme Court at general term, in *People v. Griffin* (2 *Barb. R., 481*), is in harmony with all the authorities on this subject.

If the intent be to collect a debt due or supposed to be due, it is absurd to say that the intent is to cheat and defraud. This principle underlies all the authorities.

In the case of *The People v. Griffin* (2 *Barb. R., 427*), the defendant was convicted upon an indictment charging him with having written letters to one Heath, threatening to burn and destroy his property, unless he would send defendant the sum of sixteen dollars claimed by defendant to be due from Heath. The court below, in that case (as did the court below in this case), thought that the fact of whether the prosecutor was indebted to the defendant was entirely immaterial. The court charged that it was entirely immaterial whether Heath owed him the money claimed or not. The Supreme Court

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granted a new trial, holding that the charge of the court, as given, was erroneous. The court, per WELLES, J. (*pp.* 429, 480), observe: "In order to constitute the offense created by this statute, the letters must be sent, &c., with a view or intent to extort or gain money or property, &c., belonging to another. The intent must be to extort or gain. Can it be truly said that a person extorts money which is justly his due?" [Can it be truly said that a defendant cheats or defrauds another, by obtaining from that other, even though he make false representations, that which is justly his (defendant's) due? The defendant, Smith, merely sought to obtain from the prosecutrix that which she owed him. There could be no such thing as defrauding her into the payment of a debt in this way. The defendant's object was not to cheat or defraud, but to get that which was honestly his due.] Justice WELLES (*p.* 480), further observes: "In view of the well established rule, that penal statutes are to receive a strict construction, I must interpret this as intending to embrace only cases where the intent is to obtain that which, in justice and equity, the party is not entitled to receive. The end, as well as the means employed to obtain it, must be wrongful and unlawful." This language is entirely applicable to the case at bar. The money to pay his debt, Smith was entitled, "in justice and equity," to receive. The end, to wit, the collection of his debt, was certainly not wrongful or unlawful. Justice WELLES continues to illustrate this doctrine, well and forcibly, as follows: "If A. meets B. in the highway, and by threatening his life, induces B., through fear, to surrender his watch or horse to A., this is robbery. If, in the case supposed, B. defends himself or escapes and retains his property, A. is guilty of an attempt to rob. If, however, in either case, A. is able to satisfy the jury that he believed the property to be his, and that he was obtaining, or attempting to obtain what he honestly supposed belonged to him, although, in fact, his claim was not legal, and the property really belonged to B., he should be acquitted. So, in the case of larceny, if the defendant can show he took the goods alleged to be stolen, under a

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bona fide claim of right, the case becomes a mere trespass. In all these cases, the fraudulent intent is the essence of the offense."

The following cases are illustrations of the principle that the end had in view, as well as the means of accomplishing it, must be unlawful in order to constitute this offense.

In *People v. Thomas* (3 Hill R., 189), the defendant falsely represented to one Jones, against whom he held a promissory note, that it had been lost or burned, and thereby induced Jones to pay it. Afterward, the defendant negotiated the note to another person for value, without apprising him that it had been paid. The court held the conviction wrong, on the ground that Jones had not been defrauded. The defendant, Thomas, by false representations and by artifice, had obtained payment of his debt. In the case at bar, Smith, even assuming that he falsely represented that the flour and meal were on the cart, merely obtained payment, or rather part payment of a debt which was due, or which he believed due, from the prosecutrix.

In the case of *The People v. Williams* (4 Hill R., 9), the indictment charged that the defendant falsely pretended to Van Gilder that one Gray was about to sue him on a bond which he, the said Gray, then held and owned against Van Gilder, and that the said Gray was about to foreclose a certain mortgage which he then held and owned, and by such false pretenses obtained the signature of Van Gilder to a deed of lands. Although the facts were proved as stated in the indictment, the court held that the prisoner had committed no offense, and ordered a new trial.

The principle underlying these, as well as all the authorities on the subject, is, that if the intent be to collect a debt existing, or supposed to exist, there being in such case an absence of intent to cheat or defraud, or if the false representation or pretense be such that no legal injury can result, there is no criminal offense.

V. The court below erred in refusing to charge the jury as

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requested by defendant's counsel, that upon the evidence in the case the defendant was entitled to an acquittal.

The chief representations averred in the indictment to have been *false*, to wit, that defendant represented that he was clerk and agent of Riegelman & Deffaa, and had authority to collect the money, were proved on the trial to have been *true*.

In the case at bar the only representation claimed to have been made by defendant that was not proven to have been *true*, that the flour was on the cart, leaving the prosecutrix to infer that it was on its way to her, was entirely *immaterial*, for Smith could just as well have stopped the cartman of Riegelman & Deffaa on the route to the prosecutrix, as to countermand the order. The "*material thing*" was that the flour had been *ordered*; and this representation was *true*. (*Ranney v. The People*, 22 N. Y. R., 413.)

Upon the facts and circumstances proved in the case, assuming everything testified against the prisoner to have been true, the testimony was not capable of any legal construction which could impute the offense of false pretenses to the prisoner. Upon the undisputed facts, the evidence of the prosecution — the whole evidence — the defendant was clearly entitled as matter of law to an acquittal, and the court below should have so charged the jury.

VI. The court below erred in refusing to allow the witness Deffaa to state what he (the witness) said to defendant at the time defendant ordered the flour to be stopped. To which defendant excepted. Also in refusing to allow the defendant to prove what transpired between him and the witness Deffaa before he stopped the flour. To which defendant excepted.

If defendant had committed any offense, it would have been *complete* at the time he obtained the money. (*See People v. Genung*, 11 Wend. R., 18.) The court held that the offense (obtaining a signature by false pretenses) was complete when the signature was obtained. JEWETT, J., in *People v. Orissie* (4 Denio R., 427), says that the Supreme Court has often held "that the offense is *complete* when a party has been induced, by a pretense within the statute, to affix his signature to an

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instrument," &c. If Smith did not entertain an intent to cheat and defraud *when he obtained the money*, no offense could be predicated upon an intent formed *afterwards*.

The proposed evidence was also competent as forming a part of the *res gesta*. The prosecution had proved the fact that Smith did not send the flour, that he countermanded the order, clearly what he had said to Deffaa, and what Deffaa said to him, constituting the transaction, was admissible as forming the *res gesta*.

The very definition of *res gesta* applies to the proposed evidence. In 1 *Phillips' Ev.*, 194, the author says: "*Words and writings appear, perhaps, more properly to be admissible as part of the res gesta, when they accompany some act, the nature and object, or motive of which are the subject of inquiry.*"

VII. The court below erred in refusing to allow defendant to show that "Frederick Stoesser (the husband of prosecutrix) was insolvent, and that the ownership of the store had been frequently transferred by him to his wife, and again by her transferred to him by conveyances fraudulent as to creditors."

The prosecutrix having testified, on her direct examination, that she carried on business at 82 Delancey street, six years, and having also testified, under defendant's objection, that at the time Smith sold to *her* flour, her *husband* carried on the business, the testimony proposed was competent, 1st. For the purpose of contradicting, on cross-examination, what she had testified to on the *direct* on this subject; 2d. As tending to show that her indebtedness to defendant was fraudulently incurred; 3d. As bearing on the question of the absence of any intent, in law or in point of fact, on the part of defendant to defraud the prosecutrix.

VIII. The indictment in this case is fatally defective, for the reason that there is no sufficient description of property alleged to have been obtained by false pretenses. The judgment should, therefore, be arrested.

In an indictment for false pretenses, the description of the property obtained must be as particular and specific as in cases

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of larceny. (*Whar. Cr. L.*, 4th ed., § 2155; 3 *Chitty Cr. L.*, 947; *Conger's Case*, 4 *City Hall Recorder*, 65.)

An indictment describing the things stolen as "three dollars in divers pieces of silver current in this State, and of the lawful value of three dollars, is bad, on error." (*Lord v. State*, 20 *N. H. R.*, 404.)

The court, *per* GILCHRIST, J., in this case (p. 405), say: "The indictment should contain a description of the pieces of silver stolen. In *Rex v. Frey* (cited in *Russell on Crimes*, 109), it was held that "ten pounds in moneys numbered was bad upon a motion in arrest of judgment."

In this State, in the county of Carroll, it has lately been held that "sundry pieces of silver coin, current by law, within this State, amounting together to the sum of twelve dollars of the goods, chattels and moneys of," &c., was an insufficient description of property alleged to have been stolen. The authorities show that a defect of this kind is not cured by a verdict, and by reason of it, the judgment must be reversed; and it is unnecessary to inquire into the other ground of error."

Where a person was indicted for stealing three eggs of the value of two pence, TINDALL, C. J., held the indictment to be bad, for not stating what sort of eggs they were; for all that appeared in the indictment they might be adder's eggs, or other eggs which could not be the subject of larceny.

Defective descriptions of the offense charged (the description of property is a material part of the description of the offense) is not one of the points in which an indictment is cured by verdict, but the same is equally fatal upon a motion in arrest of judgment, as upon demurrer or a motion to quash. (*State v. Gore*, 34 *N. H. R.*, 510.)

From these authorities it is clear that the indictment is fatally defective.

A. Oakley Hall (District Attorney), for the People.

I. The question, "who was carrying on the business," was properly admitted against the prisoner, because — as his whole cross-examination shows — he had opened the inquiry. It

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was probably an irrelevant matter, but prisoner could not object to its being followed up on his beginnings. But the People are unable to discover how, in any event, the answer prejudiced him.

II. The offers, to show that the husband of the prosecutrix was insolvent, and that he and she had defrauded creditors, were properly refused.

Because the evidence included by the offers was irrelevant. (*Elementary Law of Evidence, passim.*)

III. The conversation between prisoner and Deffaa were properly excluded.

They were liable to the reasons given in *People v. Wiley* (3 *Hill R.*, 211), for excluding naked declarations in a prisoner's favor; and they were, as regards the People or the prosecutrix, *res inter alios*.

IV. The court properly excluded an offer to impeach complainant. The facts sought after were collateral. Moreover, the evidence offered was not of a competent or appropriate character.

V. The court correctly charged on the subject of false pretenses in cheating a man into his duty — as the prisoner's phrase was.

The facts at bar did not warrant the request to charge, even if that request was correct in law. There is nothing in the case to show that Mrs. Stoesser owed prisoner anything, were the fact admissible. So far from that, it appears by affirmative inference that the prisoner had made an assignment. Moreover, the evidence seems to show that Smith formed the intention of pocketing the money and applying it to his debt after the false pretense had been used and his design accomplished.

If the doctrine contended for by the prisoner was tenable, then disputed claims could be collected by telling ingenious lies in the manner confessedly practiced by the prisoner.

The case of *People v. Thomas* (3 *Hill R.*, 170), so relied upon by prisoner, was decided upon the insufficiency of the indictment. It is evident, from reading the reported case; that:

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if the maker of the note had been compelled to pay the note a second time, he (the maker) *would* have been defrauded.

VI. The allegation of obtaining "*money*," which is in the indictment, is sufficient.

An objection to the sufficiency of such pleading, in the case of *People v. Niles*, was taken by the late David Graham, but the objection was overruled in both Supreme Court and Court of Appeals, and the point is *res adjudicata*. (See *Indictment and Points in the Niles case*; and *MSS. reasons for no opinion having been published*.)

CLERKE, J. For the purpose of determining the question involved in this case, I will assume that Mrs. Stoesser was indebted to Smith in the amount which he obtained from her on the 28th of October, 1862. The question, then, is, if by means of false representations or pretenses, by which a creditor makes his debtor believe that the debtor shall receive a new and valuable consideration, and induces the debtor to part with money therefor—the creditor, at the time he takes the money, intending not to give the new consideration, and, accordingly, never giving the debtor the new consideration, but applying the money, as he intended to apply it at the time he received it, to the payment of the old debt—is he guilty of the legal offense of obtaining property by false pretenses?

The counsel for the accused refers to two cases which would seem to sustain the negative of this proposition: the one, *Williams' Case* (7 Carr. & Payne, 354); the other, *The People v. Griffin* (2 Barb. R., 431). The first of these cases was tried at the Brecon Assizes, before Mr. Justice COLERIDGE and a jury. The circumstances were these: A. owed B. a debt, of which B. could not get payment. C., a servant of B., went to A.'s wife and obtained two sacks of malt of her, saying that B. had bought them of A. C. knew this to be false, but took the malt to B., his master, to enable him to pay himself the debt. Mr. Justice COLERIDGE told the jury, if they were satisfied that C. did not intend to defraud A., but only to put it in his master's power to compel him to pay a just debt, it would be

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their duty to find him not guilty. It is not sufficient, he added, that the prisoner knowingly stated that which was false, and thereby obtained the malt; they must be satisfied that the prisoner, at the time, intended to defraud A. The jury rendered a verdict of not guilty. In the other case to which the counsel of the accused has referred, the defendant was convicted upon an indictment charging him with having written letters to one Heath, threatening to burn and destroy his property unless he would send the defendant the sum of sixteen dollars, claimed by defendant to be due to him from Heath. The court below thought that the fact of the indebtedness of Heath was entirely immaterial, and so charged the jury. The Supreme Court, at the Cayuga General Term, January, 1848, granted a new trial, holding that the charge was erroneous; Mr. Justice WELLES, in delivering the opinion of a majority of the court, observing: "In order to constitute the offense created by statute, the letters must be sent with a view to extort or gain money or property belonging to another. The intent must be to extort or gain. Can it be truly said that a person extorts money which is justly due?"

Considering the sources from which these decisions have come, they are undoubtedly entitled to respectful consideration. But they appear to me so entirely at variance with the well-known policy of the law, that I cannot regard them as of controlling authority in this case. That policy is, not to give any man the right of self-redress, except in the well-known instances of self-defense, recaption or reprisals, entry on lands and tenements, when another person has, without any right, taken possession thereof, and abatement of nuisances. In the two instances of self-redress which relate to the repossession of property, the law limits the right only to cases where it can be exercised without force or terror or any breach of the peace. Otherwise, this right would be inconsistent with the peace and good order of society, which it is one of the principal purposes of the law to encourage and support. If every man were allowed to redress himself by force and violence, society would fall back into that condition which characterized it before it

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emerged from the barbarism of the dark and middle ages, when every man and every family undertook to avenge themselves, and the land "was filled with violence." Instead of the peaceful administration of justice by impartial tribunals, feuds and factions, transmitted from generation to generation, would obstruct all industry, and render any progress in wealth, refinement or the arts of life impossible. In the same way, and for reasons equally important, the law discourages the employment of fraud or falsehood in the endeavor to obtain redress. Although there are some duties, such as truth, which are termed duties of imperfect obligation, which the law does not undertake to enforce, yet it will never encourage the violation of any of these duties by sanctioning their violation, even in the endeavor to accomplish a lawful end. This would be legalizing the profligate doctrine that the end sanctifies the means—a doctrine not only abhorrent to conscience and the Divine law, but at variance with the principles of municipal law, of which the object is not only to preserve society from open violence, but to discountenance everything that is calculated to encourage artifice and dishonesty in the intercourse of men with each other. If it is wise to forbid men from using force to collect a debt, it is equally wise to forbid them from using fraud to collect it. If strife is not the immediate consequence of the latter, it will, if generally sanctioned, lead to it. It will, at all events, inevitably breed imposture and falsehood, which are quite as pernicious to the best and highest interests of society as violence. Besides, is it to be taken for granted that debtors have no rights? Is it enough for a man to say that another is his debtor? The latter may, as, indeed, in the case before us, have a defense to the claim, the sufficiency of which can be properly determined only by the tribunals appointed by the law to ascertain the truth. It would be unjust, by sanctioning a trick, to deprive an alleged debtor of the attitude in which he stands, and allow his alleged creditor to recover his demand without requiring him to prove it where it is disputed, and giving the former an opportunity of substantiating his defense.

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This is the result which such a practice would undoubtedly produce; and though injured creditors may, by such means, occasionally obtain their rights, many debtors would be deprived of their rights. So that where it is said, in the cases above quoted, that "the defendant's object was not to cheat or defraud, but to get that which was honestly his due," this is not the question, but the proper consideration is, is it safe to allow every man to be a judge in his own cause, and, in officiating in that capacity, to allow him to resort to false pretenses to accomplish his purpose? If a person having, or pretending to have, a claim against another, is allowed to do what in any other case would render him liable to punishment for obtaining goods under false pretenses, why should he not also be allowed to do what, if he had not such a claim, would render him liable to punishment for the crime of larceny? Would the law, for instance, recognize his right to take money furtively out of the desk of his alleged debtor, and apply it to the payment of his debt? He has the opportunity, without force, of doing this, and in the language employed by the court, in *The People v. Griffin*, "his object is not to cheat or defraud, but to get that which is honestly his due." The intent would be precisely the same as in the case before us, and the only difference would be, that in the one case he obtained money by means which the law, in ordinary cases, calls false pretenses, while in the case I have been supposing, he would obtain it by means which the law, in ordinary cases, calls larceny. But I think he would be convicted of larceny in this supposed case.

The case of *The People v. Thomas* (3 *Hill R.*, 169), though going very far, does not sustain the principle asserted by the counsel for the accused. In that case there was a misrepresentation as to the loss or destruction of the note. The note was due, and the maker was willing and ready to pay it. On paying his money he knew that it was to be appropriated to the payment of the note. He was not induced by the misrepresentation to give it for any other purpose, on the promise that he was to get another consideration for it. It did not

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appear from the indictment that Jones sustained any damage by the false representation. The case turned upon the sufficiency of the indictment. Whether the maker of the note would or would not be injured by any subsequent disposition of the note, was purely speculative.

I think the recorder fairly and clearly presented the true question to the jury, and properly refused to charge as the prisoner's counsel requested.

The objections taken to the indictment and the rulings on the evidence are equally untenable.

The conviction should be affirmed, and the Sessions directed to proceed to judgment.

Justice BARNARD concurred.

SUTHERLAND, P. J. (dissenting). The question in this case is not one of morals, but of crime. The prisoner was indicted in the New York General Sessions, for obtaining from one Rachael Stoesser the sum of \$82.70 in money by false pretenses. The crime is statutory. The words of the statute are: "Every person who, *with intent to cheat or defraud* and her shall designedly," &c.

Assuming that the pretenses or representations set forth in the indictment, were shown to have been designedly made, and to have been false, the question presented by the exceptions to the recorder's charge is, could the prisoner be legally and properly convicted, if the false representations were made and the money thereby obtained, with the intent to apply or credit the same on a just debt, then due and owing from Rachael Stoesser to the prisoner? In other words, the question presented by the recorder's charge, and the exceptions to it, is, could the prisoner be lawfully convicted if he used the false and fraudulent means charged in the indictment, for the purpose of obtaining the payment of a just debt, due and owing to him from Mrs. Stoesser? If, when the money was obtained the prisoner intended to apply it on a just debt, due to him from her, can it be said that he intended to *cheat or defraud her* out of the money? I think not. To complete the statutory crime, the means, the pretenses or representations

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must not only be false and made designedly, but they must also be made with a particular intent, to wit, to cheat or defraud another.

In equity a debtor's money belongs to his creditors. It is a maxim of equity that a debtor must be just even before he is generous.

If Mrs. Stoesser's money went to pay a just debt of hers, it went where it ought to have gone. If the prisoner obtained the money by lying designedly by means of the false representations charged in the indictment, he was guilty of a moral delinquency, of fraud or deceit, if you choose to say so, shocking to the moral sense; but if he resorted to this foul means merely for the purpose of procuring payment of an honest debt, I do not see how it can be said that he intended to defraud Mrs. Stoesser out of her money. If such was his intention, all you can say is, that by lying, without any personal violence or breach of the peace, he obtained what belonged to him. If such was his intention, he was not guilty of the crime defined by statute, although he may have perpetrated a gross fraud. If one citizen can, without going to law, procure from another citizen what justly belongs to the first citizen, without any breach of the peace or injury to the public, that is, by any means not criminal, I do not see why he cannot do it without being guilty of any crime.

These are my views of the question irrespective of cases, but the case in *7 Carr. & Payne*, referred to by Mr. Justice CLERKE in his opinion in this case, appears to be in point, and to tend to the same conclusion; and I do not see why it should be disregarded.

If Mrs. Stoesser was indebted to the prisoner at the time he obtained the money, in an amount larger than the sum obtained, it does not follow that his intention, at the time he obtained the money, was to procure the payment, or part payment of that debt. His applying the money on the debt may have proceeded from an afterthought.

With the other questions in the case, I think the recorder should have submitted to the jury the questions as to the fact

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or existence of the indebtedness of Mrs. Stoesser to the prisoner, and as to the intention, and should have charged the jury, that if they found that Mrs. Stoesser was, at the time, &c., indebted to the prisoner in an amount equal to or greater than the sum of money obtained, and also found that the prisoner, when he made the false representations and obtained the money, intended to apply it on such debt, and did subsequently so apply it or credit it, that they must acquit, however false or designed the representations by the prisoner may have been.

My conclusion is, that the conviction of the prisoner should be reversed, and that a new trial should be ordered.

Judgment affirmed.

SUPREME COURT. New York Special Term, February, 1861.
Before *Leonard*, Justice.

THE PEOPLE v. CHARLES M. JEFFERDS.

An application by a prisoner, indicted and imprisoned for an offense not triable in a Court of Sessions, to be discharged, on the ground that he has not been brought to trial within the time prescribed by part 4, chap. 3, title 5, sec. 31, of the Revised Statutes, may be made to any court having jurisdiction to issue a writ of *habeas corpus*. The right to discharge in such a case is not limited to the Court of Oyer and Terminer.

Where such an application was made to the Supreme Court at special term, in a case where the prisoner was indicted for murder, and it was shown by the public prosecutor that a special Court of Oyer and Terminer had been ordered by the governor, to be held in the county within a few days thereafter, before which it was his intention to try the prisoner, it was held that the cause assigned was a satisfactory one, under the thirty-second section (2 R. S., 737), and the court ordered the prisoner to be detained in custody, and adjourned over the matter to a day after the sitting of the Oyer and Terminer, with leave to renew the application at that time, if, in the meantime, the indictment should not be brought to trial.

THIS was an application to be discharged from imprisonment on *habeas corpus*, on the ground that the prisoner, who

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was indicted and imprisoned for an offense not triable in the Court of Sessions, had been detained in prison beyond the time prescribed by 2 Revised Statutes, 787, § 31.

A. Oakley Hall, for the prisoner.

Nelson J. Waterbury (District Attorney), for the People.

LEONARD, J. The prisoner, Jefferds, was committed to prison June 29, 1860, on the warrant of the coroner, charged, on the finding of the coroner's jury, with having caused the death of John Walton and John W. Matthews.

An indictment against Jefferds was found at the Oyer and Terminer by the grand jury, October 16, 1860, for the murder of Walton and Matthews.

The prisoner has been confined in close custody ever since his commitment by the coroner, and no other process for that purpose has ever been issued.

Two regular terms of the Oyer and Terminer have been held in this county since the term at which the indictment was found, and one term in addition by special appointment of the governor, but the trial of the prisoner has not been brought on by the district attorney, although the prisoner has endeavored to urge it on at every term of the court.

The prisoner now claims his discharge by reason of the great delay which has occurred, now nearly eight months since his imprisonment commenced.

His counsel insist that the statutes of this State, positively direct his discharge.

It is provided by the Revised Statutes (*part 4, ch. 2, title 5, § 31*), that if any prisoners indicted, for an offense not triable in a Court of Sessions but which may be tried in a Court of Oyer and Terminer, and committed to prison, whose trial shall not have been postponed at his instance, shall not be brought to trial before the end of the next Oyer and Terminer which shall be held in the county in which he is imprisoned, after such indictment found, he shall be entitled to be discharged, so far as relates to the offense for which he was committed.

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The case of Jefferds appears to be clearly within the terms of this section. He is in prison; has not applied for a postponement of his trial; and two regular terms of the court have been held in the county since the indictment was found.

The counsel for the People reply, that it is the Oyer and Terminer only, that can discharge the prisoner; and that he applied for his release to that court in December last, and that the application was there denied; that the Supreme Court, at special term, where the present application is pending, are not authorized by that section to grant the discharge, and that by reason of the denial of the application in December last, it should be deemed by the special term *res judicata*, even if this court possess jurisdiction over the matter.

It will be observed, that the section of the statute referred to, says nothing about conferring the authority upon any court whatever, to grant their discharge. The provision is, that the prisoner "shall be entitled to be discharged."

It appears to be a protection afforded to the prisoner. It insures him a speedy trial, in conformity with the right guaranteed by the Constitution of the United States.

One of the objects of the writ of *habeas corpus* is, to protect every person in the enjoyment of his liberty, unless he is lawfully restrained of it. The granting of that writ is enjoined upon every justice of the Supreme Court, on a suitable application.

When the writ is granted, and the prisoner has been brought before him, there is no exception by law as to the power of the justice to set the prisoner at liberty, if it appear that he is unlawfully restrained.

The next section is also explanatory as to the court which is authorized to hear this question.

Section thirty-two provides as follows: "If satisfactory cause shall be shown by the district attorney, to any court to which application shall be made under the last section, for detaining such prisoner in custody, or upon bail until the sitting of the next court in which he may be tried, the court

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shall remand the prisoner, or shall hold him to bail as the case may require."

This section contemplates that the application may be made before the courts other than the Oyer and Terminer. If it were not so, reference would not be made in the law "to any court to which application shall be made."

It is the right of the prisoner to demand and have a speedy trial. It is his right to have his trial at the next term of the court after that at which the indictment shall be found, unless there has been a postponement at his instance.

If he be not then brought to trial, he is entitled to be discharged, unless the district attorney show satisfactory cause for detaining him until the next sitting of the court.

The decision of the judge who held the Oyer and Terminer in December last, is, no doubt, a sufficient answer for not bringing the accused to trial at that term; but it is no answer for not having brought him to trial at the term which was held in January, 1861.

It cannot be possible that a denial of an application to be discharged, made in December, on the ground that a greater delay had then occurred than the statute permits, will bar an application on the same ground, after another term, subsequent to the former application, has elapsed.

I shall therefore hold that there is no legal reason existing, why the present application should not be entertained, or why it should not now be granted, so far as my authority or jurisdiction has been questioned as a justice of the Supreme Court sitting at special term.

No cause has been shown by the public prosecutor for further detaining the prisoner, except that a special term of the Court of Oyer and Terminer, to be held in this city, has been called by the governor, for the 27th of February instant, at which term the trial of the prisoner will, as he alleges, be brought on.

The short time which will elapse before that court will be organized, and the enormity of the offense with which the prisoner stands indicted, induce me to regard the cause assigned

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as a satisfactory one, within the meaning of section 32, above referred to, and to detain the prisoner in custody until the sitting of said special term of the Court of Oyer and Terminer.

The application may stand adjourned till March next, or it may then be renewed if the accused should not have been brought to trial.

SUPREME COURT. New York General Term, November, 1862.
Ingraham, Leonard and Barnard, Justices.

CHARLES M. JEFFERTS, plaintiff in error, v. THE PEOPLE,
defendants in error.

Charge of the recorder in a case of murder, tried under the act of 1860, discriminating between and defining murder in the first degree and murder in the second degree, and commenting upon the rules of evidence applicable to each. To justify a conviction on circumstantial evidence, the facts and circumstances must be such as to exclude every other hypothesis than that of the guilt of the accused.

Discussion, by the recorder, of the evidence bearing upon the question of motive for the commission of the act.

The rules of law which render the confessions of a prisoner inadmissible as evidence when obtained under promises of favor, stated and explained by the recorder.

Sentence of the prisoner, pronounced by the recorder, on conviction of murder in the first degree.

On a trial for murder, evidence of threats made by the prisoner two years before the alleged murder, was admitted. On review, it was held that such evidence was admissible, and that lapse of time was no objection to its competency; and it was also held that evidence afterwards given on the trial, showing that, after the threats had been made, friendly feelings were restored between the parties, did not render the previous evidence of threats incompetent, but made only an additional fact for the consideration of the jury in determining the weight to be given to them.

It is not a good reason for striking out evidence of the confessions made by a prisoner, that it appears such confessions were made while the prisoner was intoxicated, and that such confessions had been obtained by a detective police officer, who sought, by furnishing liquor, to ingratiate himself into the

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confidence of the prisoner. It belongs to a jury, in such a case, to say how far the prisoner was affected by the influence of liquor when he made the confessions, and what weight they are entitled to.

Such confessions, if made without any promise or inducement, though obtained by deception, the prisoner being misled as to the true object and character of the officer, are to be considered as voluntary.

A request made by counsel to the court, to consider him as excepting to each question to be asked a witness, is too general to be available. Each exception should be distinctly taken, and separately incorporated in the bill of exceptions.

The mother of the prisoner having been called, in his behalf, as a witness, and having testified, on her direct examination, that she was the widow of W., who was killed at the same time and by the same person as M., for whose murder the prisoner was on trial, held, that it was not erroneous to permit the prosecution to prove, on the cross-examination of the witness, facts tending to show a relation to W., different from that sworn to by the witness.

For the purpose of proving that she was not the widow of W., as stated by her on her direct examination, it was held proper to ask her, on the cross-examination, if she had ever been married to H. M., who was stated by her to be still living; and such marriage having been denied by her, held, also, that it was competent to ask her, on the cross-examination, whether she had ever made an affidavit stating that she was the wife of H. M., it appearing that such affidavit had been lost; and after she had stated that she had no recollection of having made such an affidavit, it was held to be competent to prove the making, by her, of such an affidavit by the magistrate before whom it was taken.

Held, also, that for the purpose of disproving her relation to W., claimed by the witness, and, also, of discrediting her, it was competent for the prosecution to introduce, in evidence, a deed executed by H. M., and by the witness as his wife.

It is not error in a judge, in charging a jury, to comment on the facts, or even to state his own theory in regard to them.

Where a capital case has been tried at the General Sessions of New York, the Supreme Court has power, on writ of error, under the act of 1855 (*chap.* 337, § 3), to order a new trial, when it shall be satisfied the verdict was against law, or against the weight of evidence, or that justice requires a new trial, "whether any exception shall have been taken, or not, in the court below."

THE prisoner was indicted for the murder of John W. Matthews, alleged to have been committed on the 30th June, 1860, by shooting with a pistol, and pleaded not guilty.

The issue was tried before the Court of General Sessions, in and for the county of New York, in December, 1861, JOHN T. HOFFMAN, recorder, presiding.

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The case was conducted, on the part of the prosecution, by NELSON J. WATERBURY (district attorney), and, on the part of the defense, by ROBERT D. HOLMES and JAMES T. BRADY.

The facts claimed on the part of the prosecution, and sought to be proved, will best appear from the opening of the case by the district attorney, which was as follows :

MR. WATERBURY : " May it please the court — gentlemen of the jury. The prisoner at the bar, Charles M. Jeffers, is indicted for the murder of John W. Matthews, who was shot on the 30th day of June, 1860. On that evening, a gentleman by the name of John Walton, the stepfather of the prisoner, was killed on the corner of Eighteenth street and the Third avenue. He was passing up on the north side of Eighteenth street, and, as he approached the corner of Third avenue, a man was seen by several witnesses — two at least — lurking behind a tree that stood there ; and that man, the prosecution claim, and we think we shall be able to satisfy you, was the prisoner at the bar. Mr. Walton was accustomed to visit that neighborhood in the evening of every Thursday and Saturday. He had a distillery, or refinery, or some establishment of that kind, in Eighteenth street, near the First avenue ; and it was his practice to go there on those evenings, and to leave in company with a young man by the name of Pascal, who was with him on the evening in question. As they neared the corner of the Third avenue, the prisoner, who was lurking, as I have stated, behind a tree, stepped out, as Mr. Walton passed, and shot him, by putting a pistol to the back of his head, the ball ploughing its way upwards through his brain, and inflicting a wound from which he died, very shortly. The prisoner then ran down Third avenue to Seventeenth street, through Seventeenth street to Irving place, and then turned into Irving place. As he was running, the deceased man, John W. Matthews, a public spirited citizen, hearing the cry of murder, and impelled by a noble spirit to do what he could towards the arrest of a man who had committed so atrocious a crime, joined in the pursuit. Being a vigorous and alert man, he gained rapidly upon the prisoner, so that when

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the latter had passed a little way down Irving place, some thirty or forty feet—I think it was—below Seventeenth street, he suddenly turned and fired at Matthews, who was then within six feet of him, killing his second victim almost instantly. From thence the prisoner fled into Sixteenth street, towards the Fourth avenue, suddenly sprang over an area fence and hid himself under a stoop, until pursuit had ceased, when he came out, and escaped by passing to the Fourth avenue, jumping, at Seventeenth street, on a car going up, and, at Nineteenth street, changing to a car going down. In this way he probably proceeded to the foot of the Park, and from there to the south ferry, and crossed over in a ferry-boat to the Union Hotel, No. 1, Atlantic street, Brooklyn, at which he was then stopping. The question in regard to the identity of the prisoner is one of great importance. You will understand that, in asking questions relative to identity, the prosecution are confined to general questions, and the answers of the witness to such questions. We cannot probe him by a cross-examination, and develop the precise extent of his opinion in respect to the identity of the person, and the degree of confidence which he has in it. That is the especial right and privilege of the defense, and it will be in their power, by a thorough cross-examination of each of these witnesses, to show to you exactly how strong or how firm the witness is, in whatever opinion he may express in regard to the identity of the prisoner, as the person seen by him that evening.

There will also be corroborative evidence of statements made by the prisoner to a gentleman from Long Island by the name of Betts, with whom he had been boarding; to another gentleman, to whom he was introduced on the following Sunday—the day next after the murder; and to the people of the house at which he was stopping, I believe, gentlemen, the effect of this evidence will be such as to leave no doubt in your mind of the guilt of the prisoner.

But, in addition, you will have explicit evidence of confessions by the prisoner, that he killed Mr. Walton, the first of the two men who were shot that night; and here I may also

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state to you, that it will very likely appear that those confessions were made while the prisoner was somewhat under the influence of liquor. There is an old saying, that "when wine is in, wit is out." Liquor often has an effect to stimulate the mind and loosen the tongue, and when men are very slightly affected by drink, they are apt to make statements which they would withhold in their more sober moments.

This, gentlemen, is a very brief statement of the testimony which will be submitted to you in this case, bearing upon the question of the guilt or innocence of the prisoner."

It appeared on the trial, that the prisoner had already been tried for the murder of Walton, and acquitted.

Many witnesses were examined on the part of the prosecution, who proved facts and admissions tending to establish the guilt of the prisoner.

After the evidence was closed on the part of the prosecution, the counsel for the prisoner called, as a witness, Mrs. Ellen M. Walton, the mother of the prisoner. She testified, among other things, that she was the widow of John Walton, and then proceeded to give other material testimony in the case.

On her cross-examination, she testified that she had had three husbands, viz., Charles Jefferts, Francis S. K. Russell and John Walton, and no others; that Charles Jefferts died in 1853; that she married Mr. Russell in 1851, and supposed at that time that Mr. Jefferts was dead; that she had not then lived with Mr. Jefferts for seven years; that she lived with Mr. Russell about two years, and left him because he was intemperate, and that he was not then living; that she married Mr. Walton on 17th October, 1858; that her marriage with Russell was annulled, on the ground that Jefferts was alive; that she lived with Hamilton Morrison as his wife, but was never married to him; that she never went before an officer and swore that she was Morrison's wife; that she had no recollection of ever having made such an affidavit; that Hamilton Morrison is now living, and that she had written to him three or four letters since the death of Mr. Walton.

Samuel W. D. Moore, called by the prosecution, proved that

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he was formerly a police justice in the city of Rochester, and knew Hamilton Morrison; that about ten years ago, Mrs. Walton appeared before him and made an affidavit that she was the wife of Hamilton Morrison; that he had made a thorough search for the paper, and could not find it.

All this evidence was objected to on the part of the prisoner, and exceptions taken to its admission.

The prosecution also put in evidence a deed executed by Hamilton Morrison and Helen M. (Mrs. Walton), as his wife, and an exception was taken by the prisoner's counsel to its admission in evidence.

The other evidence on which questions of law were raised, will sufficiently appear in the opinion of the court.

After the close of the evidence, the prisoner's counsel moved to strike out of the case all the testimony as to the alleged confessions or declarations of the prisoner, while under the influence of intoxicating drinks, on various grounds then stated at length. It was then consented that the motion should be disposed of by the court at some subsequent time, or on its charge to the jury.

The counsel for the defense and the district attorney having addressed the jury on the facts, the recorder proceeded to charge the jury as follows:

GENTLEMEN OF THE JURY: The trial of Charles M. Jeffers—one of the most remarkable in the annals of criminal jurisprudence—is drawing to a close. For nearly five days you have listened, with the greatest patience and care, to the details of the evidence for and against him. Counsel, than whom none in the State is more distinguished and able, has addressed you to-day, with great power and eloquence, in his behalf; and a prosecuting officer, than whom I have never known one more conscientious and faithful, has presented to you, in all its force, the array of facts which bear against him. It remains for me, now, in the solemn discharge of my duty, briefly to instruct you upon the law, and to review the facts of this case, and, when I have done that, the responsibility rests with you. It is for you then, if you believe the prisoner to be guilty, to

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pronounce him so, and by your verdict to consign him to that punishment which, if he is guilty, he deserves; or, if you believe him not guilty, to say so, and forever discharge him from accountability to any earthly tribunal for the crime with which he is charged. The prisoner, gentlemen, stands here indicted for the murder of John W. Matthews, on the 30th of June, 1860. The facts connected with that murder have made it necessary to investigate another murder, and we have had to inquire into the circumstances attending the death both of John W. Matthews and John Walton; the motives which bear upon the question of the killing of Walton, and everything connected with the antecedents of the persons in any way associated or connected with him. I shall, for the purposes of my charge, assume—although it is a question of fact for you to determine, and I do not desire, and shall not attempt, to take that question away from you—that the man who shot John W. Matthews shot John Walton. You may not think so, gentlemen. If so, if you differ from me, you will take the responsibility of doing so. But, upon the evidence as I understand it, I shall assume that fact.

The first question to be considered, as matter of law, is, whether the man who killed John W. Matthews is guilty of murder in the first degree. I understood it to be admitted upon the trial, and I so noted in my minutes, that John W. Matthews came to his death by the bullet shot from the pistol in Irving Place, on the night of the 30th of June, and that whoever killed him was guilty of murder in the first degree. There has been, however, some discussion of that question by counsel for the defense. I therefore feel bound to instruct you upon that point precisely as if that admission had not been made, and to state to you what constitutes murder in the first degree; and it will be for you to determine whether the prisoner is guilty of that offense. By the act of 1860, April 14, the legislature subdivided murder into two degrees, and declared that "all murder which shall be perpetrated by means of poison, or by lying in wait, or by any other kind of willful, deliberate, and premeditated killing, or which shall be commit-

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ted in the perpetration, or the attempt to perpetrate, any arson, rape, robbery or burglary, or in any attempt to escape from imprisonment, shall be deemed murder of the first degree, and all other kinds of murder shall be deemed murder of the second degree; and the jury before whom any person, indicted for murder in either degree, shall be tried, shall, if they find such person guilty thereof, find in their verdict whether it be in the first or second degree."

It will be conceded by everybody that whoever shot John Walton was guilty of murder in the first degree, because there was clearly manifest the lying in wait which is spoken of in the statute. Whether the killing of John W. Matthews was murder in the first degree, so far as it turns upon the evidence in this case, will depend upon whether you find that the killing was willful, deliberate, and premeditated. Now, in regard to that, what I have to say is this: that if a man, being pursued by another, turns upon him, and willfully, deliberately, and premeditatedly kills him, he is guilty of murder in the first degree; and it is a matter of no consequence whether he deliberates one minute or one hour, whether he premeditates one minute or one hour, whether he forms that design one minute or one hour before. If there is willful, deliberate and premeditated killing, it comes within the definition of the statute, and is murder in the first degree. If, on the other hand, there is not the design to kill, but willful, deliberate, and premeditated shooting, with the intention to do some bodily harm, and death results, it is murder in the second degree. But the law presumes that every man intends the natural consequence of his acts. As for instance, if a man places a pistol at the breast of another, at his heart, or any other vital part, and fires, the law presumes he means to kill him, and it is for him to rebut the presumption. Under this statement of the law, in case you find that the prisoner was the person who fired the pistol, it is for you to say whether he is guilty of murder in the first or second degree.

The evidence in this case may be divided, in plain language, into that which is known as circumstantial and that which is

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known as positive; and the latter includes proof of the declarations of parties, which are called "confessions" and "admissions." In regard to circumstantial evidence, the rule is, that, to justify a verdict of guilty, the facts and circumstances must be such as to exclude every other hypothesis than that of the guilt of the accused. If, upon the evidence, you have any reasonable doubt as to his guilt, you are to give him the benefit of that doubt, and acquit him. I say, reasonable doubt: I use that expression; and it commends itself to your common sense. You will at once distinguish it from any fanciful theory or speculative doubt, which can have no warrant in reason or foundation in fact. The prisoner is always entitled to every reasonable doubt that exists in the minds of the jury. Circumstantial evidence, to repeat, in order to be sufficient to convict a man, must be so perfect in its chain as to exclude every other hypothesis than that of guilt. Now, gentlemen, you all know that circumstances, to use a common, homely phrase, may lie. So may witnesses upon the stand; but, because circumstances may deceive, because there may, at times, be such a chain of circumstances as to point out, with apparent certainty, the guilt of a man, and yet it be found, thereafter, that he was innocent, it does not therefore follow that circumstantial evidence is to be rejected. Because witnesses upon the stand may commit perjury, and a man, through the means of their perjury, be consigned to a felon's cell, and his innocence be afterward established, it does not follow that the testimony of witnesses must be rejected. Men have been known to confess, to make admissions of crime which it afterward turned out that they had never committed; and yet it does not follow that confessions should be rejected and go for nothing. The true rule is, that evidence, no matter what its character, whether circumstantial, whether positive or direct, or whether proof of the statements of a party, commonly known as confessions—the true rule is, that all evidence is to be carefully scrutinized by juries, as intelligent men, and if, upon the evidence, no matter what its character may be, their judgment is convinced of the guilt of the accused, then they are to find him guilty.

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if not, they are to acquit him; and because the books contain cases in which innocent men have been convicted upon evidence which seemed to be conclusive, juries are not to allow a man to go unpunished if they are convinced that he is guilty. Upon the subject of confessions, I shall have more to say hereafter.

I do not propose to review the facts of this case at any length. It would seem to be an unwarrantable consumption of your time. Counsel on each side have discussed them fairly; and believing, as I do, that there has been no misrepresentation of the evidence, I do not consider it to be my duty to recite them at any length. I shall only hastily and briefly call your attention to the main facts, in the order in which they have impressed my mind. It is not possible that I should have presided during this trial without forming an opinion in this case. No man could do that, yet I have no right to indicate my opinion to you. I trust I shall not. If I do, you are to disregard it, because in the consideration of the question, whether this man is guilty or innocent, the law has made you the judges. You are to determine that matter; it is your responsibility; and you are not to be governed by any expression which may inadvertently escape me, or by any opinion which may be inferred from the course of my remarks. This murder, this killing (perhaps it would be more proper for me to use that word), occurred on the 30th of June, 1860. It was near midnight, when, on the upper corner of Eighteenth street and Third avenue, where there was a drug store, not yet closed (you remember that one of the witnesses speaks of a man coming out of the drug store), a man stood partially concealed behind a tree, and two men, John Walton and Richard Pascal, walked along on the north side of that street, from the Second avenue, and came to where he was. He stepped out in the bright moonlight, in the public street, close by the open drug store, in sight of a man who was standing on the opposite corner, and placed a pistol to the head of John Walton, and shot him, and Walton died.

Now, gentlemen, the commission of this murder may seem

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to you to be the act of a cool, calculating, cold-blooded, scheming assassin, or it may seem to you to be the act of a desperate, reckless man, who was willing to take the chances of escape, even under circumstances which seemed to render his detection not only possible, but probable; not only probable, but certain. I do not know how the facts may impress you. Look at them in all their aspects, and determine for yourselves which would have been most likely to have done the deed — a calculating, scheming, experienced assassin, or a bold, reckless daring man — because that decision may aid you in coming to a conclusion in this case. The facts may indicate to you, and probably do — there seems to be no dispute about it — that whoever stood upon the corner, to fire the shot which killed John Walton, knew his habits. He seems to have been in the habit of spending two nights in the week at his place of business in Eighteenth street — on Thursday night leaving to go home at an early hour, between nine and ten o'clock, and on Saturday night between eleven and twelve. The murderer was waiting for him on that Saturday night, between eleven and twelve o'clock. It is probable, therefore, that he knew his habits, or had been watching him, and knew that he would come that way.

The murder having been committed by somebody, the man who committed it ran down the Third avenue, along the middle of the street, to Seventeenth street, through Seventeenth street to Irving Place, and when in Irving Place he turned upon one of his pursuers, fired again, and the second man fell, exclaiming, "I am shot," and died. I do not suppose, gentlemen, that once in a thousand times two shots could have been fired in such quick succession, under such circumstances, and have resulted in the death of two men, and the man who fired them have escaped immediate detection. The murderer made his way through Irving Place to Sixteenth street, and was seen going towards the Fourth avenue. A man was seen to jump over the area railing at No 87 Sixteenth street, and go under the steps; that is what Mary Ann Davis says. Now, whether that man was the one who shot these two men, or whether the

latter kept his way through the street, and was not the man whom Mary Ann Davis says she saw, is a question for you to determine. I do not know what conclusion you may come to in regard to that. If the murderer went under the steps of No. 37, from which it is said the cars of the Fourth avenue could be seen, and Mary Ann Davis says she heard the cars coming about that time, he afterwards came out and walked briskly towards the Fourth avenue, and that was the last that was seen of him, by anybody who saw either the killing or the pursuit, and the last that was seen of him by anybody that night, so far as we have any positive testimony in the case.

Such, gentlemen, are the circumstances of the murder and of the escape, and we now come to the question whether there is anything in the facts of this case to indicate the man who committed the act. As to John Walton, we know that that night he was at his place of business in Eighteenth street. We have some knowledge—I cannot say it was directly proved, although Mrs. Walton said something about it—that he had been to Washington, from which place he had returned on the Thursday night previous; still, there is no positive testimony on that point. We know, also, from the testimony of an employee at that place in Eighteenth street, that that evening he had been sitting, just before he left the place, upon a barrel, talking and laughing with one of the men; and we know that he started from there in the company of a man who was in the habit of being with him whenever he was out at night. Now, as to the prisoner's whereabouts previous to and at the time of this occurrence, because we are to see whether there is anything which connects the prisoner with this matter, with that unerring certainty which is necessary to fix this charge upon him. He had been at Cutchogue from the 1st to the 28d of June, and on that day, Saturday, he left, saying that he was going to Delaware, and went to the Union Hotel in Brooklyn. We know nothing more of him, except that on Monday he returned to Cutchogue, saying to the landlord of the Union Hotel in Brooklyn, that he would be back on Thursday. On Thursday he returned to the Union Hotel.

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On Saturday, the 30th of June, some time in the afternoon, he went to New York. He is seen in New York that evening, between eight and nine o'clock, going up Broadway. O'Brien says he met him, and he, O'Brien, was going down. There is no other direct testimony as to where the prisoner was that night, except that he returned to Brooklyn.

The prisoner is to be convicted only in case the prosecution make out a case against him. He is not bound to furnish any evidence, and his counsel is right in saying that he is not to be convicted on account of his failure to produce testimony as to where he was that night. The only testimony that he has presented on that point, is that of the witness, O'Brien, that he met him going up Broadway in the evening. The next that we know of him with certainty is, that some time between fifteen and thirty minutes past twelve at night, he came to the door of the Union Hotel, Brooklyn, and, as Mrs. Costigan says, rapped suddenly, with a loud knock, and she let him in. The time at which he arrived is fixed by her and by her son at between fifteen minutes past twelve and half-past twelve.

Now, gentlemen, the first question, it strikes me, on this brief review of the evidence, for you to determine in your minds, is — for it is, after all, the main question in this case, above and beyond anything else in it — was it possible for the prisoner to have committed the murder at the time and place mentioned, and have been in Brooklyn at the time at which the witnesses say he arrived there; because we have the two facts to start with, undisputed, that he was in New York, going up Broadway, early in the evening, between 8 and 9 o'clock, and that he was again in Brooklyn between a quarter and half-past 12. If the jury find that it was possible, then we will see what facts there are to indicate that he was the murderer. Now, as to the time of the murder: Richard H. Pascal left Walton's store, he says, about 25 minutes past 11; the store was near that corner, not far down the street. Samuel Lee says what he saw of the occurrence was between 11 and 12; he fixes the time indefinitely. Henry Hessel fixes the

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time at 11.30. Wm. A. Bayley says that he looked at his watch just an instant before he heard the shot, in Irving Place, and it was 20 minutes past 11. Joseph H. Foster says that he turned the corner of Irving Place at 11.20, heard the pistol report, and felt conscious of a person passing him at or near the northwest corner of Sixteenth street. Henry J. Morgan fixes the time between 11 and 11.30; he says a man ran into Sixteenth street. Thomas M. Lewis saw the man shot, and fixes the time about 11.30. John J. Bradley heard the shot at about 11.20. Mary Ann Davis is indefinite about it, and says it was between 11 and 12. Francis says that at 11.33 a man jumped on to his car. Gilliland fixes it at between 11.15 and 11.25. Frederick Curtis fixes the time at about 11.20—so that somewhere, gentlemen, between 11.20 and 11.33, being the most remote times fixed by the witnesses, this murder was committed. The question is, therefore, whether the murderer, having committed this murder at that time and at that place, could have reached Brooklyn at the time testified to? Because, if you find it to be an utter impossibility for this prisoner to have been at the two places and at the time specified, the confessions become of little consequence; whereas, on the other hand, if you find that it was possible for him to have been at the two places at those times, then the confessions become very material. I do not consider it, gentlemen, as very important, in my view of the case, how long the murderer staid under the stoop of No. 37 Sixteenth street, or whether, indeed, he was the man who jumped into that area, or how long he may have been running from one point to another. If the murder was committed at any time between 11.20 and 11.35, in Irving Place, and a man was running at full speed, it would seem by this evidence, as I read it, that he could very easily have caught the car anywhere in the Fourth avenue, which car, you will recollect, appears, by the testimony of the conductor, to have left the upper depot at Twenty-sixth street, at half-past 11. If, by either running directly from the scene of the murder, or stopping under the stoop until he heard the car approaching, he

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could have reached the Fourth avenue in time to take the down-car, or else the car going up, as far as Nineteenth street, and then the down-car—if he could do either, then it appears, by the time-table of the railroad, he could have reached the Astor House at two minutes before 12. The conductor, Francis, says that the car which he had charge of came along by Fifteenth street at 11.33, when a report of a pistol was heard. Whether that was the shot which produced the death of Matthews, or some other shot, is for you to determine; it is not for me to say. At any rate, it started the horses. At Seventeenth street, while he was sitting on the platform of his car, a man, running from the direction of the corner of Sixteenth street and Fourth avenue, jumped on the rear platform of the car, took a seat inside, and disappeared from the car before it got to Nineteenth street, without his departure being noticed. At Nineteenth street the down car was met. If the man who committed this murder got on to the up car, and then took the down car, or if he got on to the down car, without having entered the up car at all, he should have reached the Astor House at two minutes before 12. The ferry boats left at a quarter past 12—seventeen minutes between the arrival of the car at the Astor House and the departure of the boat at the ferry. Could he have gone the distance from the Astor House to the ferry, on foot, taken the ferry boat, and arrived in Brooklyn at the time fixed? Upon that question, gentlemen, you have the evidence of three officers, and they will give you this report. Officer Glass made the journey on Tuesday evening. He started from the corner of Eighteenth street and Third avenue at 22 minutes past 11, and landed in Brooklyn at 22 minutes past 12. He stated he had to wait several minutes at the ferry. Officer Foshay made a similar journey on the same evening, starting at 25 minutes past 11, arriving in Brooklyn at 23 minutes past 12. Officer Quackenbush made the journey from the corner of Eighteenth street and third avenue, leaving at 11.20; he got to Nineteenth street and Fourth avenue at 11.24, waited eight minutes for a car, got to the lower end of the Park at 11.55, went

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quickly to the south ferry, arriving there at three minutes past 12. The boat left at 14 minutes past 12, and touched the Brooklyn side at 12.21. His watch evidently varied from the time of the boat, because he puts the hour at which the boat left this side at 12.14. Now, gentlemen, it is for you to determine, as matter of fact, upon a review of the evidence, whether it was possible or not for the prisoner to have performed this journey. You have heard the comments of the counsel for the defense and for the prosecution; both sides have been fairly presented to you. I do not say whether it was possible or whether it was not. If you find that it was possible, then the next question is, whether the facts in the case indicate that the prisoner is the man who committed the murder, and whether they indicate it to a certainty, or whether they indicate merely a probability.

Mr. Brady: Your honor will pardon me for suggesting that, in this connection, they are to consider the testimony of Dr. Jones, as to the physical condition of the prisoner.

Recorder: In regard to the testimony of Dr. Jones, and I am very much obliged to the counsel for calling my attention to it, who testified as to the physical condition of the prisoner; he stated that in the condition in which he was on Monday night, the murder having been committed on Saturday, it would have been exceedingly painful, if not impossible, for him to have made that journey. In answer to a question by the foreman of the jury, as to whether a journey, made under the circumstances described, would not have been calculated to have aggravated his condition from what it was before, he answered, "yes." That, gentlemen, as you will perceive, leaves the question open as to whether the prisoner was in the condition on Saturday in which he was described to have been in on Monday, or whether the aggravated condition of his complaint was the result of something occurring between Saturday and Monday. You have the testimony of the doctor upon that subject. If you believe that, in consequence of his physical condition, he could not have made that journey, or that his condition would have been effective to have prevented

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him, it is a circumstance in his favor, to which you will give full consideration. If, on the other hand, you think it possible that this aggravated state of the disease might have been caused by the violent exercise, you will attach less weight to the testimony of Dr. Jones. If, in view of all these facts, you think it was possible for him to have made that journey, then is it probable, or is it certain, that he is the man who shot the deceased? Now, there is some evidence of identity, slight, indeed, but yet evidence upon that subject. Pascal says that, at the time, he thought it was Charles Jeffers. I desire to be spared any comment at all upon the testimony of Pascal. You have heard his testimony. You have heard what the prosecuting attorney and the counsel for the prisoner have said, and you know how well they agree in their estimate of Pascal's actual knowledge in this matter. There is no necessity for me to say anything further upon this subject, except to call your attention to the fact that Pascal said he knew Charles Jeffers well, and, at the time, he thought the man was Jeffers. Hessel, the soldier, said "that the man looked like Jeffers." Mary Ann Davis, who saw his side face when he went in, and his full face when he came out from under the stoop, said "the man looked like Jeffers." Francis, the conductor of the car, said "the man who got into his car looked as much like him as two men can look alike." Curtis said nothing at all upon the question of identity; he said something in regard to the clothing. Now, gentlemen, in regard to evidence as to identity, there is no doubt about the fact that there have been terrible mistakes made at times by witnesses who have undertaken to testify upon that subject. The books abound in cases of this kind, and there are numerous instances in which men have been just as positive in their testimony as to identity as about anything else, and have been mistaken. It does not always follow, because a man says, "that was the man," that his testimony is entitled to any more credit than that of another who says, "I verily think that was the man." It may be a different expression to convey the idea. Yet, any testimony at all upon the question of identity, coming from

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people who have merely a glimpse of a man running in the moonlight, under the exciting circumstances attending such a chase, is to be looked at cautiously and subjected to the most careful scrutiny. The only man, except Pascal, and except, perhaps, Hessel, who stood on the other corner, who could have had any near view of the murderer's face, was the conductor of the car, and he said "that he looked as much like Jeffers as two men can look alike."

If there were no evidence in this case except this evidence of identity, I do not suppose that any person would ask for the conviction of the prisoner, because, when the opportunity was so slight as was that furnished to these witnesses to see the murderer, there would be so much room for mistake that jurors would, of course, give the prisoner the benefit of the doubt; but if the other facts and circumstances in the case indicate that the prisoner is guilty, then this evidence of identity, weak as it may be, becomes a necessary and important element of the case, and you will give it that attention which you think it deserves. There is other testimony in regard to the man who committed the murder, and that is in respect to his clothing. All the witnesses but one say that he had on light clothing. One witness, who was in the second story of his house (whose name I do not now recollect), says if his clothing had been white he would have noticed it; in other words, that it was not light enough to attract his attention; all the other witnesses concur in saying that the murderer had on some sort of a light coat. Counsel for the defense argue that Jeffers was seen going up Broadway in dark clothes; that he arrived in Brooklyn in dark clothes. They are correct; and if Jeffers committed this murder, and had on light clothes, he must have made the change before he arrived in Brooklyn, and where he made it, if he made it all, and where he could have made it, are questions open for discussion and consideration. Of course you will give the prisoner the benefit of any doubt to which you think he may be entitled in the consideration of the case. If these witnesses may be mistaken about the color of a coat, mistaking the glare of the moonlight

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upon it for color, then that testimony will have less weight; if they are accurate in that respect, and you are satisfied of the fact, then of course there must have been a change somewhere to enable the prisoner to have arrived at Brooklyn in the clothing he is said to have had on when he reached the hotel.

These, gentlemen, are the facts, briefly stated, bearing upon the locality, the persons, the time, the circumstances immediately attending the murder, the possibility of its having been committed by a man who arrived in Brooklyn between fifteen and thirty minutes past twelve, the evidence touching upon identity and upon the clothing and other matters relative to that branch of the subject; but remember that we have not come at all to the consideration of admissions or confessions. Now, if you believe it possible or probable, upon that statement of facts, that Jefferds might have committed this murder, the next question that you will necessarily ask yourselves will be, what motive had he to commit the offense? It is very evident that whoever killed Walton, did not kill him for the sake of robbing him; that was not the motive. It is very evident that whoever killed Matthews, killed him to escape arrest, to evade pursuit; but in looking for the motive for killing Matthews, you must, of course, look back to see the motive for killing Walton. It was not robbery. Was it revenge, either of the murderer's own wrongs, or the wrongs of somebody else? That would seem to be the motive, from the character of the deed, unless it was a murder perpetrated by some one hired to do it. It is said that in all great cities there are men who can be hired to do anything, even to the taking of life; but then these men are not apt to do the deed under such circumstances. If not done by a hired assassin, then the probability is that the motive, in this case, was revenge. Had the prisoner any such motive?

Upon the question of motive, you have several matters testified to on the part of the prosecution. In the first place, there are certain threats which he made at a remote period. Now, the law is well settled that you may give evidence of

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any threats made by the accused in reference to the deceased; they bear upon the question of motive; but they may be so remote that they would have no force. If there was nothing in this case, except that as long ago as February, 1859, the prisoner threatened to shoot John Walton, and it appeared that thereafter they lived in peace, the jury would attach very little importance to that threat; but if it should appear that, as early as that period, upon provocation, such as the ill treatment of his mother, or the ill treatment of himself, he threatened to carry out a deadly purpose, namely, the taking of the life of the man who injured him or his mother, and it should also appear upon the evidence, that subsequently the causes which had aroused that state of feeling, increased in force rather than diminished, then the remote threats might have a double force and effect, because the jury might, and probably would reason, "that if a man, when he found his mother was injured once, threatened to kill the man who injured her, he would be very likely, if he found the injuries were committed again, increased and doubled, to make the same threats, and, perhaps, carry them into execution." That would be the ordinary course of reasoning in my mind; I do not know how it would be in yours. It appears by the testimony in this case, that at the time those threats were made, there was some trouble between Mr. Walton and his wife. That trouble went so far that Walton had Jefferds arrested. Jefferds made threats in the presence of Dr. Gunn, and in the presence of Mary Walton; but that difficulty passed over, and Jefferds afterward lived in the same house with his stepfather, took the young daughter of Mr. Walton to the theater, and was sent by him to Europe. It seems that the difficulties between Mr. and Mrs. Walton were renewed after that; and in the latter part of April, if I recollect the evidence rightly, Mr. Walton went away from the house in which they were living, and in May, as Mrs. Walton says, put her to board somewhere else. She was to have gone on the 1st of May, but did not go until the 8th of May, in consequence of the sickness of one of her children. Then, it appears in evidence that, about this

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time, a suit was being prosecuted against her by Mr. Walton for divorce, and the difficulties which had existed before, had ended in an open rupture. They had separated; hostile feelings existed between Mr. and Mrs. Walton; the whole matter was published in the papers, conspicuously. Mrs. Walton attempted to take some things out of the house; she was arrested for it, and she said, at the time, that Mr. Walton was at the bottom of it. So you can perceive that the ill feeling which then existed between Mr. and Mrs. Walton was greatly aggravated beyond that which existed when the threats were made in 1859. I do not propose to consider the matter at any length. It is before you. You will consider, to such extent as you may deem proper, the question as to whether or not there was a promise by Mrs. Walton to the prisoner to give him two thousand dollars to commit the murder. If you should find that there was, there would be an additional fact to show a motive for the murder. Now, if you find it possible for him to have committed the murder, and you find the motive, then, what facts, if any, point to the prisoner, and, if any, are those facts conclusive? The defendant, the prisoner at the bar, had been living at Cutchogue from the 1st of June. The separation between his mother and Mr. Walton had taken place in the latter part of April. His mother said she did not know whether she saw him (Jefferts) two weeks or one week before the murder. It is very evident, from the testimony in the case, that she could not have seen him two weeks before the murder, but on the Sunday preceding the murder, he was in the city, and she could have seen him, and that must have been the time she saw him. He had not been up from Cutchogue but once between the 1st of June and the time he came up on Thursday; that once was when he came up on the Saturday previous, saying that he was going to make a journey to Delaware to spend the fourth. He went back on the Monday following, telling Mr. Devaucene that he would return on Thursday. On Thursday he started to come back again, telling Mr. Betts that he would not stay down there, because there would be no one there, and he did not want to be alone;

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but he had made a previous appointment with the landlord in Brooklyn to be back on Thursday, and had taken his room for that day. He came back, therefore, on Thursday, and, as we have seen, remained there and in New York until the night of the murder. Now, gentlemen, another fact of the prosecution—for they claim a verdict on the facts alone—is in regard to the pistol. You will recollect that I have called attention to the fact that the separation between Mr. and Mrs. Walton occurred about the latter part of April, and that Mrs. Walton was sent away to board between the 1st and the 8th of May. On the 30th of April, Jefferts bought a pistol, precisely like the pistol found in the yard corner of Fourth avenue and Sixteenth street, the day after the murder, and which has been produced in court. Now, no one has seen that pistol in his possession since he bought it, but he bought such a pistol. If he had such a pistol, of course he could have accounted for it, but he is not bound to do so. The prosecution are bound to show that that is the pistol he bought. There is no other evidence in this case, touching such a pistol, except the testimony of Mrs. Walton, that she saw a pistol like that in Mr. Walton's house, somewhere, before the separation; so that there seems to have been in that family two pistols answering to that description. Of course no living witness can say that this pistol now here, is either the pistol that Mr. Walton had or the pistol which Jefferts bought. The most that can be said is, that they are precisely alike; and, as a single fact, it would, like almost any other single fact, amount to nothing; it may, or it may not form a necessary link in the chain of facts to establish a conviction. It may be of more or less consequence, according to your view of it. That the pistol found in the yard was the pistol with which the two men were shot, I suppose nobody will doubt; and that this is the pistol which was found in the yard, everybody admits. Whether it is the same pistol that Jefferts had, is a question for you to determine. Now, Mrs. Walton is necessarily more or less involved in this affair. There is only one single fact in connection with these circumstances which, in any way that

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I can see, bears upon the question, so far as she is concerned, beyond the question of motive; and that is, that on the night of the murder, early in the evening, she was at Mr. Moss's, opposite the place where the murder was committed.

Mr. Brady: She was in Twenty-fifth street.

Mr. Waterbury: In Twenty-fifth street, opposite to where Walton lived.

Recorder: Yes, I should have so said. Then, on the other hand, gentlemen, there is the question of clothing, and the inability of the prisoner to have made the race that night, to which I have already alluded, and which has been fully discussed. Then again, the appearance which he is said to have borne on arriving in Brooklyn — his not being flushed, nor indicating any state of excitement. These facts are to be arrayed on the other side, in considering the question whether the facts against the prisoner make a perfect chain of testimony. Now, whether a man could have made the race to the Fourth avenue, jumped on a car, ridden twenty minutes to the Astor House, then gone on a hasty pace to the ferry, waited ten or twelve minutes for the boat, as he may have waited, then have crossed the river and gone to the house, and arrived in a calm, unagitated manner, so as not to be noticed, is a question for you to determine. Mrs. Costigan, who opened the door, says she did not particularly notice the prisoner's appearance; that she had no light. I do not consider the matter of much importance, but you will give to it the weight which you think it deserves.

We now come to the day after the murder, in the continuation of the chain of facts which the prosecution claims to have made out against the prisoner. We find that the prisoner on that day came down from his room between 9 and 10 in the morning. He took no breakfast, but read the papers, those which were in the house — *The Sunday Herald*, and one of the other Sunday papers. So far as the witnesses know, he staid about the house till the table was set for dinner. They asked him to dine, but he did not want to dine, though he sat down. He did not eat much of anything. They think he

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went to his room. He came down, and the proprietor, being about to make an excursion to East New York, said, "I see you are a stranger — I am going out to East New York with some friends, won't you go along?" He asked him his name, that he might introduce him. Jefferds said it was "Charles Jackson." They went on their pleasure party. You know what took place. I do not attach much importance to the conversation, though the subject for discussion was, to some extent, murder. Jefferds asked the question, "if a man should injure your mother or sister, what would they do with you if you shot him?" The witness did not attach much importance to that. He (the prisoner) repeated the question, and finally said, "they would hang you like a dog." He returned to the hotel, not separating from the party. The next day he met Mr. Betts, called him aside, and told him that he had been accused of this murder, or implicated in it in some way, and wanted to know his opinion about giving himself up. Mr. Betts advised him to do so. After a while he took that course, and surrendered himself. He told Mr. Betts the reason he gave the name of Jackson on Sunday, was that he saw that he was implicated in that murder in the papers, and he did not want to be dragged through the streets. Well, gentlemen, it is conceded that in the only article in any of the Sunday papers which alluded to that murder, the name of Charles Jefferds was not mentioned. All that was said on that point was that it was a family quarrel, that the parties accidentally met, and that the shooting took place. Now, if there was a family quarrel, Jefferds knew of that quarrel, and that he might be singled out as a person engaged in the quarrel and as one who had probably committed the murder, and he might possibly be arrested; and not having arrived at a conclusion which would lead him to surrender himself, it would seem very reasonable that he should endeavor to evade observation. But if his name was not mentioned in the papers in any way, nor the name of any other person connected with the murder, then the question for you to determine will be, what reason could he have had in giving to a stranger a false name instead

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of his real name? This is a matter upon which the prosecution have greatly relied. If it had not been discussed fully upon the other side, I should perhaps feel bound to consider the different theories in regard to it. Certainly, the counsel for the prisoner has presented his view of the matter so ably and so fully, that it would be an idle consumption of time to reproduce his theory. I state to you the naked fact, in regard to which you have heard the argument on each side.

Now, gentlemen, I have rapidly gathered together the different facts which made up this chain, and I have stated them to you as briefly as I can from my notes. I do not think that I have omitted any important part of the chain, or that I have added one single particle to any link. If the case rested here, then the question for you to determine would be, under the rules I laid down to you in the outset of my charge, whether this chain of circumstances established to your minds, beyond any reasonable doubt, the guilt of the prisoner — whether it was such as to exclude every other hypothesis than that of the guilt of the accused. If you thought it did, then it would be your duty to find a verdict of guilty. But there is other evidence in the case, which now becomes material, independent of the question, whether you find the chain complete, or whether you find that the facts and circumstances simply indicate a probability that the prisoner committed the murder. If you find the chain complete, so that you are satisfied to render a verdict of guilty, then it would be idle for you or me to consider the case further; but if you find cause for reasonable doubt, then you come to the consideration of the confessions and admissions. The probability of the truth of these must depend, to a very great extent, upon the view you take of the other facts in the case. If it were proved to your entire satisfaction that Charles Jefferts, on the night of that murder, was in Albany, and a dozen witnesses, of unimpeached and unimpeachable character, should come into court and testify that he had said to them, openly and frankly and seriously, that he had killed John W. Matthews, you would say that the confession was not true, because

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it was proved that Jeffers was in Albany at the time. I merely give that as an illustration, to show how, when you come to consider the confessions, their value is to be estimated; You will attach more or less weight to them, according to the possibility or probability of guilt, and upon that the weight of these admissions as evidence will, to some extent, depend. I have been asked to say to you substantially, that confessions, made by a man when drunk, are not entitled to be received. That, in my opinion, is not good law. I have never, in all my reading, found a case which would countenance the doctrine that a confession, made when a man was drunk, was not entitled to be received in evidence. A case has been cited to me, and your attention was called to it, in which the prisoner told the officer who had him in custody, that if he would get him two glasses of gin he would confess. The court held that that confession, made after the gin had been taken, was inadmissible. That has been decided, and is the strongest case that can be brought; but the ruling in that case has since been doubted by very able and learned judges. I am not aware of any other case, and that case is of no authority in this, because, in that the confession was made to the officer who had the man in custody.

You will perceive the distinction which exists upon this subject of confessions or admissions. Any confession or admission which is obtained by threat, menace, hope of reward, promise of favor, or anything else which can influence the mind of the accused, held out to him by a person in authority, or by the prosecutor himself, will render the confession inadmissible as evidence, because the law will not permit its officers, having men in custody, to extract confessions from them, either by threats or by promises. Nor will the law permit a prosecutor, holding some degree of power over the accused (and possibly supposed by him to have authority to discharge him), either by threat or menace, hope of reward or fear of punishment, to extract a confession and use it in evidence. So, in some other cases, in which persons, holding and exercising authority over parties, obtain confessions, such

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confessions cannot be given in evidence; as, for instance, where a person has authority over a child, the confession is rejected; but where a man voluntarily, whether sober or drunk, makes a confession or admission to a person who is a stranger to the prosecution, who has no interest as prosecutor or public officer, then that confession is entitled to be received in evidence; and the only question for the jury is, as to the weight to be given to it; and that is more or less affected by the state of mind of the party making it, and the probability of the truth of the confession. I do not propose, gentlemen, to go over those confessions in detail. You know how they were obtained. As to the question whether public prosecutors or the chief officers of the police should obtain the confession of criminals through the instrumentality of detectives or spies; whether they should send men to get their confidence, and then obtain their admissions, that is purely a question of morals, with which neither you nor I, sitting here to determine the guilt or innocence of this prisoner, have anything to do. Some men think that no means necessary to detect and punish a criminal are dishonorable, no matter what they are; others think that criminals should be handled with gloves; that they should only be pursued by the most honorable, open and upright means. Others think that any means whatever, which result in the detection, conviction and punishment of the guilty, are justifiable. Probably in that jury box there are men who entertain each one of those different views. It is of no possible consequence which view I entertain, nor what your views may be upon that mere question of morals. If it is proved to your satisfaction that the confession was made, then the question for you to determine is, is it true? If you believe, when a man says, "I murdered your brother," or "shot your brother," that it is true, it is of no consequence whether he was drunk or sober when he says it, or whether the statement is obtained from him by a violation of his confidence, or by an intrigue, such as that which Moore is said to have exercised in respect to the prisoner at the bar. The confessions being in evidence, the sole question for you is, are they true?

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Upon the question as to whether they are true, or whether they are false, you will, of course, bear in mind the other probabilities in the case, indicating the guilt or innocence of the prisoner. Comment has been made upon the way in which these confessions are said to have been obtained, the times at which they were obtained, the condition of the prisoner when he made them. Those are all fair matters of argument before you, as affecting the question whether they are true or false, but beyond that they have nothing to do with the case. The first confession testified to by Moore, was the confession made after the sailing party, when the prisoner came near being drowned. At that time, if Moore is to be believed, the prisoner said, whether drunk or sober, while Moore was reading the paper to him, "Yes, and I shot him like a son of a bitch." Then, again, the statement in Broadway, on the way to Walton's place that night, when he attempted to show Moore how he shot Matthews, and then what took place at Walton's store, as testified to by Walton, Moore, the captain of police, McGee and Cook. Now, I do not know what your impressions are upon the evidence as to the condition of the prisoner. It strikes me as highly probable that he was intoxicated when he made the confessions, if he made them. It strikes me as highly improbable that any sober man would make such statements; nevertheless, sober or drunk, whether he made them, and whether you believe they are true, are the only questions you have to pass upon. There is no evidence, that I recollect, that the prisoner was drunk the next morning, when he had the conversation with Moore in the street, if you believe that he had that conversation, although he may have been under the influence of drink. That was the conversation when he said he would like to go and see his mother before he went up to Walton's house; and you will recollect what he said after his arrest, as detailed by Moore, if you believe it; it does not appear that he was drunk then; but these are questions of fact solely for your consideration. I shall say no more upon the subject of confessions or admissions. You have heard all that need to be said upon that subject, and this charge has

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already extended further than I intended it should. The case closed with some testimony as to character. That testimony is before you. You know how it bears, whether for or against the prisoner. I shall not repeat it. I have, in everything that I have said, in charging you, avoided any comments upon the contradictions which are put upon the testimony of Mr. Moore by Mrs. Bennett, Miss Lasselle, and Mrs. Walton herself. I do not wish to draw aside the veil from either of those persons. You have heard their statements so far as they contradict Moore, and it is for you to say, in your own good judgment, whether they discredit him. If they do discredit him, so that you throw out his testimony, then of course, the confessions would only stand as sworn to by Walton, McGee, Cook and Thorne. If you think that the record of the life of either of these women is not such as to entitle her to a preference over Moore, then you will judge Moore's testimony upon its own inherent probability. I have no desire to comment upon either of these persons; the case is full enough of sad and sickening detail—of hideous moral deformities—and I abstain from further remark.

We are not here from choice at this hour on Christmas eve; our ties, associations and inclinations would draw us elsewhere; but I felt it to be my duty, before Christmas day shall break upon us, to submit this case for your final action. I suppose neither you nor I will ever again, upon the anniversary of this sacred night, close a duty so important as this in which we have been engaged during the past week. You have, on your part, a great and solemn duty yet to perform, and I desire you to retire to your room, and with all fairness, candor and impartiality, to consider the evidence in all its aspects, and give to the prisoner the benefit of every reasonable doubt. If, then, you believe him to be guilty, unhesitatingly pronounce him so; if you do not, with like firmness pronounce his acquittal.

The court overruled the motion to strike out testimony made by defendant's counsel, and the defendant's counsel excepted.

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They also excepted to the instruction given by the court to the jury, that, "where a man voluntarily, whether sober or drunk, makes a confession or admission to a person who is a stranger to the prosecution, who has no interest as prosecutor or public officer, then the confession is entitled to be received in evidence."

They also excepted to the court's instructing the jury that they might take into consideration and act upon statements made by the defendant, when drunk, to the witness Moore.

The jury, under the instructions so given, retired, and on the twenty-fourth day of December, 1861, rendered a verdict against the prisoner of guilty of murder in the first degree, and on the fourth day of January, 1862, the prisoner was arraigned before said court for sentence.

The defendant's counsel then and there objected to the court's sentencing the defendant, insisting to the court that it had no power to do so. The court overruled the objection, and the defendant's counsel excepted.

The counsel then moved an arrest of judgment, on the ground that there was no existing law under which the defendant could be legally sentenced upon the conviction. The court denied such motion, and the defendant's counsel excepted.

The court thereupon pronounced the following sentence:

Charles M. Jefferts: The murders of John Walton and John W. Matthews, on the night of the 30th of June, 1860, sent a thrill of horror through this whole community. The former fell by the hand of the assassin, lying in wait to execute his deadly purpose; the latter, forgetting all danger to himself, and thinking only of his duty as a citizen, gave chase to the murderer, who, to escape arrest, turned upon his pursuer, and, with unerring aim, fired the shot which caused his instant death. All this occurred in an open thoroughfare of this crowded city, in the bright moonlight of a calm and beautiful summer's night, with the lights yet gleaming from the windows of the surrounding houses, and under circumstances which, it would seem, would have rendered the immediate detection of

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the murderer almost certain. From that time, however, until this last Christmas eve, the question, as to who was the actor in this terrible tragedy, has been undecided; and then it was answered by the verdict of that jury, which pronounced you guilty of the murder of John W. Matthews. That verdict has, I believe, met the approval of almost every man who heard or carefully read the evidence upon which it was founded. You were first tried for the murder of John Walton. The evidence on that trial, in July last, pointed strongly toward you as the guilty man, but was not sufficient to warrant your conviction, and you were acquitted. Once again set at liberty, you gave way to the habits of idleness and dissipation which had marked your previous course, and in your folly, consequent thereon, you made revelations to the "detective" who was put upon your track, which sealed your fate forever. Aside from the direct admission you made to him when alone, and in the presence of others, you said enough to enable the officers of justice to ascertain where you purchased the pistol with which, it is believed, the murderous deed was done. The facts which were known before, in connection with those thus discovered, secured your conviction when you were brought to trial upon the charge of having murdered John W. Matthews.

The details of the trial I shall not recapitulate. It is not necessary to do so, and I gladly refrain. They present a picture of immorality and crime, too painful to contemplate. Your mother, whom you had charged with being the instigator of your crime, came upon the witness stand, and, while testifying on your behalf, was compelled to, and did lay bare the secret history of her life. It failed to be of any service to you. Your counsel, with a zeal, fidelity and ability which could not be surpassed, exhausted all honorable means to insure your acquittal, but in vain. No human efforts could overcome the terrible array of facts and circumstances which were brought to bear against you. And now you, yet under 25 years of age, stand here a convicted murderer, and, so far as I have been able to observe, have, as yet, exhibited no sor-

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row for your crimes. Your sentence, which will be imprisonment and death, will, I hope, cause you to realize your awful situation. You cannot escape punishment, and in your felon cell, in the long weary nights yet to come, you will, if you have not already done so, think with horror upon the crime you have committed, and realize with bitter remorse the fearful judgment you have brought upon yourself. That you may, ere you die, repent and seek forgiveness of Him who is ready and willing to forgive, is the sincere prayer of the judge who presided at your trial, and who now, in the discharge of his solemn duty, pronounces sentence upon you according to law.

The sentence of the court is, that you, Charles M. Jeffers, for the murder and felony of which you have been convicted, shall, on Friday, the 20th day of February, 1863, between the hours of ten in the morning and two in the afternoon, suffer the punishment of death; and that you shall be confined at hard labor in the State prison, until such punishment of death shall be inflicted.

The prisoner was thereupon delivered into the custody of the sheriff, with a warrant for his execution.

The defendant's counsel excepted, also, to the sentence.

The case was removed into this court by writ of error.

James T. Brady and Robert D. Holmes, for the prisoner.

I. All the errors of the court below, whether the subjects of specific exception or not, are before this court, and can be reviewed. (*Sess. Laws 1855, p. 618, § 8.*)

This just license of the law is to be especially kept in view when the desultory character of some of the evidence and the recorder's charge to the jury shall come to be considered.

II. The court below erred in admitting evidence as to the alleged threats made by the accused against John Walton two years previously to the death of said Walton. Also, in admitting that of Corsa, Quackenbush and Gunn.

Friendly feelings were subsequently established between the deceased, Walton, and the prisoner, the latter of whom was

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sent to Europe by the former. That friendly feelings existed, is shown by the letter of W. T. Walton. The presumptions of law were that the unfriendly feeling had ceased, and in the exercise of a legal discretion the evidence should have been excluded. Yet the court below in its charge laid great stress on this evidence, and pointed out to the jury the mode in which they might reason upon it as a matter of fact, entirely disconnected from any question of law. The same may be said as to the testimony of Gunn.

The law, in a criminal case especially, makes the facts the undivided property of the jury, and the court has no right to offer an opinion as to their weight or the lack of it. The law directs that *twelve* minds—no more, no less—shall weigh the facts and decide upon them; no provision is made for a thirteenth mind to aid them. The law does not suppose that a judicial or legal mind can deal more justly or understandingly with facts than one unlearned in the law.

In the present instance, the recorder distinctly pointed out to the jury a course by which they could reason on those remote facts, and the results to which their minds might be brought; such reasoning having been adverse to the prisoner, and may have been one of the causes which led to his conviction.

III. The court below erred in admitting and in not striking out of the case the testimony of William T. Walton and William B. Moore, so far as the same related to the confessions or declarations of the prisoner. Those confessions were commented on at large in the charge to the jury.

Moore was a policeman, and acted directly under the instructions of the then district attorney, and now such *ad hoc*, and was paid by him with the money of the brother of the deceased Walton. Acting as an officer of the law, he made the prisoner drunk as a means of getting from him declarations or admissions which might affect his life.

In view of this the appellant contends: That the admission of those alleged confessions was a question of law and not of fact. The declaration of the court, in its charge, that confes-

sions made by a man when drunk are entitled to be received, was error.

They were not *voluntary*: they should have been, to have entitled them to have been received. They were enforced by agencies other than the voluntary action of the prisoner's mind. The true definition of the word *voluntary*, from "*volo*," *will*, and the condition of the prisoner's mind at the time that he made these declarations, become important considerations. Every elementary writer who treats of confessions, starts by declaring that they *must* be "*voluntary*." Richardson defines this to be "of the will," "wishing," "*spontaneous*," "*willful*." Tibbins, defining the word in French, and applying it to the act of a person, uses this strong expression, "*de son plein gré*," "*of his full mind or will*."

The prisoner was shown to have been drunk, and made so by an officer—acting under the direction of the district attorney—and using money, to buy liquors and for his expenses, furnished by a brother of the deceased Walton to that district attorney.

Before the prisoner knew Moore, he was a sober man. A small quantity of liquor excited him, made him drunk.

The prisoner knew that Moore was a detective. His mother informed him and Mr. Betts of the fact, and Mrs. Walton's letter to prisoner distinctly informed him of it. The prosecution produced that letter. This was not referred to by the court below.

The prisoner knew that he was liable to be tried again.

It is not pretended that the prisoner made any detailed confession as to the bargain with his mother to kill her husband, up to the 16th November, when he was made drunk at Carhale's and at Walton's; and these declarations, so made, the court below erred in admitting. These declarations the court erred in admitting:

1. In the prisoner's then condition, he could not make a valid contract—one that could bind him.
2. His will would be voidable.

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3. He could not have been sworn in a suit at law involving the most trivial sum. (*Hartford v. Palmer*, 16 *Johns. R.*, 148.)

In *Lord Thorndyke's Case* (*Pritchard on Divorce*, p. 5), the wife, while in a fit of delirium, disclosed her attachment to her paramour. On the offer to prove it, it was ruled out.

Suppose that Mrs. Walton had been indicted for her alleged share in this transaction, and Jefferts, in his then condition, had been offered as a witness: he could not have been sworn or used as a witness. Yet this court is asked to sustain the monstrous doctrine that his declarations, then made, and so made, and not on oath, shall be taken at second hand by a professed spy — a creature which communities shun and nations hang — and be used as evidence against his life. (*King v. Sexton*, 1 *Burns's Just.*, ed. 1836, pp. 1086, 1087.)

The confessions of youths are excluded because of the weakness of their minds. What strength of mind has a drunken man? Should he promise to pay money, would a court say that an indebtedness was proved? Should he attempt to do any ordinary act requiring mental direction or involving the least physical danger, would he not be restrained?

Drunkenness is temporary insanity. In the former, the mind becomes disarranged and deranged in its functions. In the latter, the same effects follow, though they may be the result of different causes. Suppose, instead of drunkenness, the prisoner had labored under the effects of some narcotic drug which benumbed his mental faculties? Would the cause, because less immoral perhaps, make the slightest difference in his capacity, or render his declarations the more proper to be received?

All medical authorities are against the soundness of the mind of a drunken man to perform, understandingly, any intellectual labor. Daily observation proves this.

IV. The court below erred in allowing specific acts of Mrs. Walton to be inquired into for any purpose not relevant to the issue.

The pretense that these questions were asked to prove that the witness was not the wife of the deceased Walton, is too

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flimsy to deserve an instant's consideration. The prosecution, as to these matters, made her its own witness, and proving the fact that she might or might not have sworn to have been the wife of Morrison, proved no fact except that of her having so sworn. It certainly did not prove her to have been or not have been married to him. But she distinctly swore that she was not his wife. The prosecution called this out, and they were bound by it.

Whether she was Morrison's wife or not, was totally irrelevant and collateral to the issue. Hence the prosecution sought to impeach the witness by drawing out irrelevant testimony, totally disconnected from anything called out on or by the direct examination, and subsequently seeking to contradict her and by testimony *aliunde*.

Thus, the whole effort of the prosecution — under an inexorable subterfuge — was directed to the impeachment of the character of the witness for truth and veracity, by proof of the commission of a specific collateral act. (1 *Greenl. Ev.*, §§ 449, 461, 462; *People v. Restell*, 1 *Comst. R.*, 379; *People v. Moore*, 15 *Wend. R.*, 419; *Lawrence v. Barker*, 5 *Id.*, 301; *Stevens v. Beach*, 12 *Verm. R.*, 585; *State v. Patterson*, 2 *Ired. R.*, 346.)

Here, then, are two violations of the best settled questions of evidence.

1. A persistent effort to contradict a witness as to matters collateral to the issue.

2. Forcing a witness to answer questions as to which she was privileged, because the matters were collateral and might have degraded her.

In both points of view the defendant suffered.

Instead of admitting the questions to be put, it was the duty of the court to have advised the witness of her rights. Had even this been done, and she had then chosen to answer, the defendant's objection as to the relevancy of the matters should have prevented the reception of the evidence. (1 *Greenleaf's Ev.*, § 451.)

She was sought to be impeached as to a collateral matter on a written paper which was not produced, and when, confess-

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edly, its contents could not be given by parole, and only its substance by mere generalities. This was done without proper search.

There is no provision in the law for the impeachment of a witness on a lost paper. It is not susceptible of being made by parol the basis of impeachment, even if relevant to the issue. The authorities are all and strongly against it. (*Saint-hill v. Bound*, 4 *Esp. R.*, 74; 1 *Greenleaf's Evidence*, § 463; *Queen's Case*, 2 *B. and Bingham R.*, 293; *McDonnell v. Evans*, 16 *Jurist R.*, 103; *Newcomb Adm. v. Griswold*, decided June Term, *Court Appeals*.)

The admission of the deed in evidence was error. That deed was collateral to the issues under the indictment. The rules of law above cited apply to this branch of the case.

It could not be made to impeach the testimony of Mrs. Walton, because she herself proved it, and in proving it showed the circumstances under which it was given. The grantees would not take a deed unless she signed it jointly with Morrison. The witness was the only person who testified as to that deed, and her statements must have been taken together. The deed did not prove a marriage with Morrison, but simply that she lived with him as his wife. Therefore the sole tendency and intention of this evidence was to degrade her.

The court, in considering the features embraced in the point, will bear in mind the vital importance to the accused of Mrs. Walton's evidence, who was the only witness who could contradict the alleged facts in the testimony of W. B. Moore as to the bargain of the prisoner with his mother to kill her husband.

V. The court below gravely erred in its charge to the jury. The rule there stated, so broad and sweeping, is violative of the authorities cited above. The court, in its charge, has taken three incompatible positions; the first of which is repugnant to the last two, and the last two being direct invasions of the property of the jury in the facts and their weight.

1st. His honor stated that he would not review the facts

2d. That he had individually formed an opinion, and could

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not help it; but that he had no right to indicate it even. He subsequently gave that opinion broad and emphatic expression.

8d. He distinctly announces that opinion. He then admits the great importance of the very evidence which he said was unimportant.

Again, he expresses an opinion on one of the most material features of the defense, and distinctly states that he does not consider it a matter of much importance.

The court again erred in charging that a *drunken* man could make, in view of law, a voluntary confession.

VI. The judgment should be arrested, there being no authority under existing laws to pronounce any sentence on the accused.

Nelson J. Waterbury (District Attorney), for the People.

By the court, INGRAHAM, P. J. The prisoner was convicted of murder in the first degree, in killing John W. Matthews.

The offense was committed in June, 1860. The cause was tried in December, 1861, and the prisoner was sentenced, on the 4th January, 1862, to suffer the punishment of death on the 20th February, 1863, and to be confined at hard labor in the State prison until such punishment of death shall be inflicted.

The case comes before us on a writ of error and bill of exceptions.

Upon the trial, the court admitted evidence of threats made by the prisoner two years prior to the murder. To this the prisoner's counsel objected. At the time this evidence was offered, no proof had been given of any friendly feeling existing between the prisoner and Matthews. It was admissible to show that for a period even as long as two years the prisoner had threatened the life of the deceased. It is no objection to such evidence that a period of years had expired since the threats were made. On the contrary, long continued animosity and ill will are better evidence of a state of mind which would ripen into deliberate murder than the hasty ebullition of passion. The theory of the law as to murder is that it is

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made on premeditation, and the motives for such an act are not the less powerful because they are the result of ill feelings entertained for years.

It was, however, urged upon the argument that it was improperly admitted because it was afterwards shown that friendly feelings existed between the parties. This evidence was put in afterwards. It was proper to be submitted to the jury, and from it to urge reasons why the threats before proven should lose their weight with the jury; but this evidence furnished no reason why the previous evidence was improper when admitted.

It is also urged that his honor the recorder, in his charge to the jury, referred to this evidence as furnishing motive for the crime.

I see nothing in the recorder's charge which is objectionable in this respect. It is true that he referred to these threats as evincing a state of feeling of hostility. At the same time he told them, if those threats had been made over two years previously, they would be entitled to little weight with the jury. It was only in subsequent disagreements between the parties they assumed more force and effect.

The instructions on this point were not erroneous, and contained sufficient caution to prevent the jury from giving more weight to them than was proper.

William J. Walton and William B. Moore, were examined by the prosecution, to prove admissions made by the prisoner, in regard to the killing of Walton. At the time these admissions were proven, no objections were made to them on behalf of the prisoner. Subsequently, the prisoner's counsel moved to have them stricken out, on the ground that they were given by the prisoner under such circumstances as not to warrant their reception.

It appeared in evidence, that these conversations were held with Moore and Walton while the prisoner was, to some extent, intoxicated. Moore, being a police officer, was employed by superintendent Kennedy and the district attorney, to follow Jefferds, with a view of obtaining this information. It

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does not appear that he received any instructions as to the means which he was to use to effect his purpose. The instructions he received are not stated. It also appeared in evidence, that one means used by Moore, to obtain the confidence of the prisoner, was to ingratiate himself into his friendship, and, with the aid of liquors freely supplied by the officer, the confessions were obtained.

It was for these reasons that the motion was made to strike out the testimony.

It must be remembered that the evidence from both witnesses was received without objection, and it was not till the whole examination was closed that the motion was made to strike out the testimony. It was, therefore, properly received at the time it was given. The subsequent evidence, showing that the confessions were made in a state of intoxication, was not sufficient to warrant the court to take these admissions from the jury. It was by no means clearly established that the prisoner, at the time he made the admissions given in evidence, was so much intoxicated that he was unconscious of what he said, or to warrant the supposition that what he said was untrue. The state of the prisoner, when the confessions were made, was properly before the jury. The argument which has been addressed to us, to convince the court that the evidence should have been stricken out, might, with more propriety, have been addressed to the jury to satisfy them that the confessions of the prisoner, made by him while in that condition, were not reliable, and ought not to have been used for his conviction. It was a question of fact for the jury to determine, what the condition of the prisoner was when he made the confessions, and how much reliance might be placed in them.

In *Rex v. Spillbury et al.* (7 Carr. & P. R., 187; 32 Eng. Com. L. R., 565), COLERIDGE, J., held that statements made by a prisoner to a constable, when he was drunk, were admissible. In that case, also, as in this, it appeared that the constable had given liquor to the prisoner to cause him to make such statements. The judge said this was matter of observation to

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the jury, as to the degree of credit such statements were entitled to.

Similar in their nature are the remarks of SELDEN, J., in *The People v. McMahon* (15 N. Y. R., 384, 391), referring to the case of a letter written by a prisoner to his father, which the turnkey promised to put into the post, but which he delivered to the magistrate, who used it in evidence, and, also, to the case of a confession made to one who had taken an oath not to reveal it, he says: "If the law was scrupulous about the means of arriving at the truth, would it have received such evidence? Is fraud more honorable than force? These cases show this, that the question always is, whether the evidence can be relied on, and not how it was obtained."

And in *The People v. Hendrickson* (8 How. Pr. R., 176), SELDEN, J., says, in his dissenting opinion, "the object of the law is to ascertain truth, and it rejects no evidence, come from what source it may, which is calculated to show light upon it."

It is true that a witness, in a state of intoxication, ought not to be allowed to go on the stand as a witness, and the counsel has urged upon us to apply to these confessions the same rule. But, while I concede to that rule all the force that can be asked for it, it is not applicable to this case. I have already remarked that it belonged to the jury to say how far the prisoner was affected when he made the confessions, and to decide what weight they would give them. A more analogous case is where a witness testifies to a matter which occurred while he was in a state of intoxication. There his evidence is not excluded, but his condition may be shown to the jury for their decision, as to its effect on the truth of his statements. Nor do I think there is anything in the objection that these confessions were not voluntary, and, therefore, should have been excluded.

Laying out of view the condition of the prisoner at the time he made the confessions, it would not be urged that they were not voluntary. They were made in conversation with a supposed friend, without any promise or inducement, and rather as a boast of what the prisoner had done, and with the know-

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ledge of his former trial and acquittal. Such confessions, although obtained by deception, must still be considered as voluntary on the part of the prisoner. It is for the jury to take all these attendant circumstances into consideration, when they determine the weight to be given to the confessions made in such a manner.

But, while I am of the opinion that there was no error in suffering this testimony to go to the jury, that would call for a new trial, I do not wish to be considered as in any manner assenting to the propriety of obtaining evidence in such a manner for the purpose of convicting a criminal.

An officer may be employed by the prosecution for the purpose of watching a supposed criminal, and for the purpose of detection. Crime often cannot be otherwise discovered. But when such an officer ingratiates himself as a friend to the criminal, when he procures liquor and uses it for the intoxication and ruin of the supposed culprit, when he urges upon him the constant use of intoxicating drinks, until maddened by their use, the accused, in a spirit of boasting rather than in the exercise of his reason, and in response to suggestions made by the officer, proclaims his guilt, it appears to me that the officer goes far beyond the line of his duty, and is guilty of conduct throwing no credit on such an administration of criminal justice. But, however much we may condemn this proceeding, still it was not error to admit the testimony on the trial. The learned judge before whom the case was tried, while he correctly held that the confessions were not to be kept from the jury, felt also unwilling to state to the jury his approval of the mode in which they were obtained.

It was also urged on the argument, that these confessions were the remarks of a drunken man, and that drunkenness was partial insanity, and therefore should have been excluded. I have heretofore referred to the condition of the prisoner as a matter proper for the jury to pass upon. He may have been so intoxicated as to have been unconscious of what his words meant, and he may only have been excited by liquor, but still possessed of his reason and judgment. All this was

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properly submitted to the jury, and the instructions on this point were not objected to.

Upon the trial, the witness, Mrs. Walton, was asked a question about John Boardman, whereupon the counsel for the prisoner stated that they did not wish to prevent the fullest investigation, and wished to leave the witness to answer fully and freely every question, but desired the court *to consider them as excepting to each question.*

Such a general mode of exception, if sanctioned, would very much tend to shorten the argument of questions relating to the evidence. If a counsel can, on the commencement of the cause, give notice that he excepts to each question thereafter to be put to a witness, it would be unnecessary to make any further objections. Such a course cannot be sanctioned, and such an exception must be unavailing. If the court, on the trial, choose to sanction it, still it can have no effect until the exception is incorporated in the bill of exceptions to each distinct question. The proposition that a full and free examination is assented to by the counsel, while at the same time he can have an exception secretly laid up to use, if necessary, on appeal, is contrary to any rule that I have known on the trial of a cause.

These remarks apply to the questions put to the witness as to Boardman, and also whether she had made oath that she was the wife of Morrison. I do not consider that these questions can be considered as answered under exception.

Even if they were, I am of the opinion that they were not irrelevant.

It would have been irrelevant for the prosecution, in the first instance, to have asked of the witness if she had been the wife of Morrison, and then, for the purpose of impeachment, to show that on some occasion the witness had made an affidavit to the contrary.

Such was not the testimony. The witness had sworn she was the widow of Walton, in answer to a question put on behalf of the prisoner.

Whether this was so or not, was not material, unless for the

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purpose of describing her relation to the deceased ; but having been proved for the defense, the prosecution had a right to show that she was not in fact his widow, by facts which disclosed the legal relation she bore to him.

For this purpose the inquiry as to Morrison was proper.

The inquiry as to the affidavit was not objected to at the time. It was urged that the proper foundation had not been laid to admit the affidavit in evidence, to contradict the witness as to her statement in regard to Morrison.

That rule rather applies to the inquiry put to the witness, whether she had made such an affidavit, than to the admissibility of the affidavit itself. The paper, if in existence, should have been shown to the witness before the witness could be asked as to its existence.

In *Billenger v. The People* (8 Wend. R., 595, 598), SUTHERLAND, J., says: The question (viz., what the witness had sworn to before the magistrate) was inadmissible on other grounds. It appeared that the examination was reduced to writing. So far, therefore, as the object of the inquiry was to show what her testimony was before the magistrate it was improper, because the examination itself was higher and better evidence, and, citing the ruling in the *Queen's Case*, that a witness could not, upon cross-examination, be asked whether, in a certain letter, he did, or did not, make certain statements, or use certain expressions, but that the letter itself must first be read before the cross-examination can be pursued, he adds, "such is believed to be the established rule and practice in this State." "This principle seems to be applicable to a case like this, and to show that the examination of the witness, taken by the magistrate, should first have been read or shown to the witness, before she could be cross-examined in relation to her testimony upon that occasion.

When the question was put to Mrs. Walton whether she had ever made oath that she was the wife of Morrison, no objection was made by the counsel calling for the production of the affidavit. It was too late afterwards to object on that ground.

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But even if made, the fact of its being lost rendered its production impossible. It could not be produced for that reason, and its contents could not be stated to the witness, because they were not known with certainty to the party making the inquiry. In *The People v. Moore* (15 Wend. R., 419-422), SAVAGE, Ch. J., says: "It is argued that the examination was not admissible until after the attention of the justice had been called to the supposed discrepancies between his parol account of the testimony of Crofoot and the testimony, as stated, in writing, in the examination, in answer to which it will be observed that it was impossible to draw the attention of the justice to the supposed discrepancy, as the paper was not in evidence, nor in the possession of the defendant's counsel, who could not, therefore, know with certainty what it contained."

So, in this case, the production of the paper was excused by its loss. The time and place, and subject matter of the affidavit, was stated to the witness, sufficient to call it to her recollection. This was all that could be done if the paper was lost, and was all that was required to warrant proof of its contents.

The evidence of the deed executed by Morrison and Mrs. Walton, as his wife, was admissible for the purpose stated by the court, if I am correct, in the preceding remarks, as to the admission of evidence to show that she had sworn she was the wife of Morrison.

The same rule will apply to this evidence as to that, viz., that it is admissible as contradicting the testimony of the witness, given by the defense, that she was the widow of Walton.

The other exceptions are to the charge of the recorder.

I see nothing in the comments on the facts which shows any error. How far it is advisable for a judge to refer to the facts of a case, must depend entirely on his judgment and discretion. It is not error to comment upon them, or even to give the theory of the judge in regard to such facts as are proven. If, after all, the decision of the facts is left to the jury, it affords

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no ground of exception that the judge has reviewed the evidence on any branch of the case. This was done by the recorder throughout his charge.

Nor do I consider the charge obnoxious to the construction, put upon it by the defendant's counsel, that a drunken man could, in view of the law, make a voluntary confession. His remark was, where a man voluntarily, whether sober or drunk, makes a confession, &c., such confession is to be received in evidence. There is no error in that remark, more especially with the qualification that it was the province of the jury to decide what weight was to be given to it.

The charge that, whether this offense was murder in the first degree depended upon whether the jury should find that the killing was willful, deliberate and premeditated, was only in accordance with the words of the act of 1860. Whether it was so or not, was left to the jury, and also what degree of murder, if any, was for them to decide.

Upon all the exceptions thus raised, I find no error calling for a new trial; and am of the opinion that the verdict should not be disturbed, therefore.

This cause having been tried in the Sessions, the rules applicable to exceptions by the statute of 1855 are very much relaxed, and the court may order a new trial if it shall be satisfied that the verdict was against law or against the weight of evidence, or that justice requires a new trial.

If the evidence was properly admitted, there can be no ground for a new trial in this case. I have already referred to all the grounds of objection suggested to us by the counsel for the prisoner. Nor do I feel warranted in saying that there is anything in the case which would bring it within the provision of the statute that justice requires a new trial. No error has been committed; and the case having been fairly submitted to the jury, and their verdict having been rendered without any appearance of prejudice or partiality, there is nothing which calls for the exercise by this court of the powers conferred by that statute.

The remaining question is that which arises as to the effect

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of the act of 1860 in altering the law of murder. By a stipulation between the counsel, the argument in this case was to be made in the case of Lowenberg at the same term. In that case the court have decided to affirm the judgment. I have expressed my dissent in that case; but the conclusion of the court being adverse to the prisoner, the judgment must be affirmed.

SUPREME COURT. Broome General Term, May, 1864. *Campbell, Parker, Mason and Balcom, Justices.*

THE PEOPLE v. WILLIAM MOODY.

The wanton, malicious and secret destruction of the personal property of another is a misdemeanor at the common law.

The prisoner was indicted for having, in the daytime, maliciously and clandestinely, and in a spirit of wantonness and revenge, cut, mutilated and injured the harness of D. T. The indictment was quashed at the Sessions, on the ground that it did not charge any criminal offense, either at common law or by the statute. On error, the judgment was reversed, the court holding that the offense charged amounted to malicious mischief, and was punishable by the common law as a misdemeanor.

The case of *The People v. Kilpatrick* (5 *Demo*, 277), commented on and distinguished.

Form of an indictment for malicious mischief, and of an entry in the record quashing the same.

AN indictment, of which the following is a copy, was found against the prisoner, in the county of Tioga:

"*Tioga county, ss*: The jurors of the People of the State of New York, in and for the body of the county of Tioga aforesaid, to wit, Lorain Curtis, &c., good and lawful men of the said county of Tioga, then and there being duly sworn and charged upon their oaths to inquire for the People of the said State of New York, in and for the body of the county of Tioga aforesaid, upon their oaths aforesaid, present:

"That William Moody, late of the town of Owego, in the county of Tioga aforesaid, on or about the twenty-third day

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of July, in the year of our Lord one thousand eight hundred and sixty-two, at the town of Owego aforesaid, unlawfully, willfully and maliciously intending to injure one David Taylor, then of the town of Tioga, in said county of Tioga, and disturb the peace of the People of the State of New York, and from a spirit of wantonness and black and diabolical revenge, which he, the said William Moody, then and there held against the said David Taylor, without just cause, did, at the time and place first aforesaid, to wit, on the twenty-third day of July, in the year of our Lord one thousand eight hundred and sixty-two, at the town of Owego aforesaid, feloniously, maliciously and mischievously, and in a secret and clandestine manner, with some sharp instrument which he, the said William Moody, in his right hand then and there held, cut, sever, hack and otherwise disfigure the reins and tugs and other useful appendages of a certain single one-horse harness, of the value of fifteen dollars, the property, goods and chattels of the said David Taylor (and the said William Moody then and there well knowing said harness to be the property, goods and chattels of said David Taylor), thereby damaging, injuring and partly destroying said harness and the tugs and reins and other useful appendages aforesaid belonging to the same, and rendering the same nearly useless, and with the wicked, felonious and malicious intent aforesaid, against the peace of the People of the State of New York and their dignity.

"And the jurors aforesaid, upon their oath aforesaid, do further present, that the said William Moody, late of the town of Owego aforesaid, on or about the twenty-third day of July, in the year of our Lord one thousand eight hundred and sixty-two, at the town of Owego aforesaid, with force and arms, feloniously, maliciously and mischievously, and from a spirit of mere wantonness and revenge, which he, the said William Moody, then and there held against the said David Taylor, and in a secret, sly and clandestine manner, did cut, sever and otherwise disfigure, damage and injure, by the use of some sharp instrument to these jurors unknown, which he, the said William Moody, in his right hand then and there held, a certain

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one-horse harness, of the value of fifteen dollars, the property of the said David Taylor, and then and there in his possession, against the peace of the People of the State of New York and their dignity.

"And the jurors aforesaid, upon their oaths aforesaid, do further present, that the said William Moody, late of the town of Owego aforesaid, on or about the twenty-third day of July, in the year of our Lord one thousand eight hundred and sixty-two, at the town of Owego aforesaid, with force and arms, unlawfully, willfully and maliciously intending to injure one David Taylor, did feloniously, knowingly and maliciously, and in a spirit of mere wantonness and revenge, and without any hope or expectation of gain or advantage, and in a secret and stealthy manner, in the daytime, cut, sever, damage and destroy a certain one-horse harness of the value of fifteen dollars; of the goods and chattels of the said David Taylor, and then and there in his possession, against the peace of the People of the State of New York and their dignity.

"And the jurors aforesaid, upon their oath aforesaid, do further present, that the said William, late of the town of Owego, and county aforesaid, on or about the twenty-third day of July, in the year of our Lord one thousand eight hundred and sixty-two, at the town of Owego aforesaid, with force and arms, did feloniously, maliciously and wantonly, and in a secret and clandestine manner, injure and deface, by the use of some sharp instrument, to these jurors unknown, which he, the said William Moody, in his right hand then and there held, a certain one-horse harness, of the value of fifteen dollars, of the goods and chattels of one David Taylor, and then and there in his possession, and then and there being the product and work of art, and then and there situate on private ground in the town of Owego aforesaid, against the form of the statute in such case made and provided, and against the peace of the People of the State of New York and their dignity.

"D. O. HANCOCK, *District Attorney.*"

The prisoner was brought before the Court of Sessions of the county of Tioga, and pleaded not guilty.

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The following entry was then made on the record :

Afterwards, to wit, at said last mentioned term of the Court of Sessions, and on the 16th day of December, A. D. 1862, the said William Moody, in open court, and with the leave of said court, withdraws his plea of not guilty, and then and there by his counsel, John J. Taylor, moves the said Court of Sessions, composed of the county judge of said county, and the justices of Sessions of said county as aforesaid, to *quash* said indictment and discharge the said William Moody, the prisoner at the bar, on the alleged ground that the said indictment does not set forth or describe any criminal offense, indictable either at common law or by any statute law of the State of New York.

D. O. Hancock, district attorney of said county of Tioga, who prosecutes for the People of the State of New York, in and for the body of the said county of Tioga, then and there opposed said motion of the prisoner's counsel, and objected to the granting thereof, and insisted upon the prisoner's pleading to said indictment, and upon a jury being called to try the same. And upon due argument had, the said Court of Sessions, composed of the county judge of said county, and of the justices of Sessions of said county, as aforesaid, to wit: On the said 16th day of December, A. D. 1862, at the said term of said court, did in open court grant the said motion of the prisoner's counsel, and quash said indictment, and discharge the said William Moody, the prisoner at the bar, and for the alleged reasons aforesaid, to which decision and ruling of said court the said district attorney did then and there, and in due form of law, duly except, which exception was then and there, by the said court, duly noted.

The record was then removed into this court by a writ of error sued out by the district attorney.

D. O. Hancock (District Attorney), for the People.

J. J. Taylor, for the defendant.

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By the court, CAMPBELL, P. J. The prisoner was indicted at the Tioga County Sessions for malicious mischief; the particular offense charged was, that he did, in the *daytime*, but *secretly* and *clandestinely*, and with malice, cut, mutilate and injure a harness. The counsel for the prisoner moved to quash the indictment, on the ground that "it did not set forth or describe any criminal offense indictable either at common law or by any statute law of the State of New York." This motion was granted by the Court of Sessions. There is no pretense for holding that the offense charged falls within the provisions of any of our statutes. The only question is, whether this offense charged—the wanton destruction of personal property in the daytime, but done secretly, clandestinely and maliciously—is a crime or misdemeanor at common law, for which an indictment can be sustained, or whether it is simply a trespass for which the offender can be punished only in a civil action. There are express adjudications on this question in our State and in other States, some of them conflicting and leaving the law apparently unsettled. Before alluding to them, I desire to present some general suggestions for the purpose of casting, perhaps, some faint light on an interesting controversy. Much respect has been paid to the statements of the great commentator on English law, Sir William Blackstone. His Commentaries have been received as authority, and are, as all admit, entitled to the highest consideration. In reference to the subject under consideration, he says, in book 4, ch. 17, "*Malicious mischief* or damage is the next species of injury to private property which the law considers as a *public crime*. This is such as is done, not *animo furandi*, or with an intent of gaining by another's loss, which is some, though a weak excuse, but either out of a spirit of wanton cruelty or black and diabolical revenge, in which it bears a near relation to the crime of arson, for, as that affects the habitation, so this does the other property of individuals. And, therefore, any damage arising from this mischievous disposition, though only a trespass at common law, is now, by a multitude of statutes, made penal in the highest degree. Of these I shall extract the contents in

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order of time. And first, by statute, 22 Henry VIII, ch. 11, perversely and maliciously to cut down or destroy the powdike in the fens of Norfolk and Ely is felony." Several other statutes are referred to in successive reigns after Henry VIII, in which the offense is declared to be felony without the benefit of clergy. Our interest now is in reference to the period of time when, according to Blackstone, malicious mischief was first, by statute, declared a crime in England. The 22 Henry VIII, would be about 1531. The offense is one which the commentator says "the law considers as a '*public crime*.'" It bears a near relation to arson, which, especially house burning, was a crime at common law. It is an offense committed "out of a spirit of wanton cruelty or black and diabolical revenge." It is an offense toward which our English ancestors were specially sensitive, as evidenced by the multitude of statutes enacted for the purpose of punishing the offender with a severity which seems to us not called for by the nature of the crime. Is it credible that there was in England, prior to 1531, no such statute regulating the punishment of such offenses, and that no indictment could be maintained at common law? It was about 1071, or in the fourth year of William of Normandy, that he solemnly swore that he would observe the ancient and approved laws of England, particularly those of Edward the Confessor; and subsequently those laws, together with such alterations as the Conqueror made, were ordained and declared, in a general council during his reign, to be the laws of the land, and in all things to be observed. The laws digested and collected by Edward the Confessor were, it is said, principally those of Alfred, and thus combining the ancient unwritten laws and customs of the Britons, the Picts and Danes, with the written and unwritten laws and customs of Saxons, and Romans, and Normans, the foundations of British law were laid, and the great fountain of the English common law was unsealed. From the 4th of William I, to 22 Henry VIII, a period of nearly five centuries, during all which time the common law bore sway, it is, as remarked, hardly credible that there was no criminal punish-

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ment of the crime of malicious mischief. May we not rather conclude with HUTCHINSON, Justice, as quoted and approved in *Loomis v. Edgerton* (19 Wend. R., 420), that "the statutes were so ancient, and the punishment so severe, that they were, of course, resorted to, and the common law thus lost sight of, though the statutes were intended as a mere increase of its penalties?"

In Pennsylvania and Massachusetts indictments for malicious mischief have been frequently maintained, though there were no State statutes declaring the offense criminal.

In *Republic v. Feischer* (1 Dallas R., 335), the indictment was for "*maliciously, willfully and wickedly killing a horse.*" The attorney-general observed that "he had not been able to discover any instance of an indictment at common law for killing an animal, or indeed for any species of malicious mischief, yet that the reason of this was probably the early interference of the statute law to punish offenses of such enormity, for that in all precedents, as well ancient as modern, he had found the charge laid '*contra formam statuti.*'" He further said, "the law proceeded upon principle, and not merely upon precedents." The indictment was sustained, and, as the attorney-general had claimed, upon principle, the chief justice, in pronouncing the judgment, saying, "that whatever amounts to a *public wrong*, may be made the subject of an indictment."

In case of *Commonwealth v. Leach and others* (1 Mass. R., 58), the indictment was for *poisoning a cow*. The indictment was at common law. No doubt was expressed but that the indictment would lie at common law. The question considered was, whether the Court of Sessions had jurisdiction. In that case, SEDGWICK, Justice, said: "It appears to me, generally speaking, that the *English statutes*, which were in force at the time of the emigration of our ancestors from that country, are *common law* here." DANA, Chief Justice, said: "The term '*common law*,' ought not be construed so strictly as is contended for by the counsel for the defendant. Generally, when an English statute has been made in amendment of the common law of England, it is here to be considered as

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part of our common law." In *Commonwealth v. Wing* (9 Pick. R., 3), Chief Justice PARKER, quoting approvingly Chief Justice SEWALL, in *Cole v. Fisher* (11 Mass. R.), says, in relation to the unnecessary discharge of guns, that "when the act is accompanied with purposes of wanton or deliberate mischief the guilty party is liable, not only in a civil action, but as an offender against the public peace and security, and is liable to be indicted."

In *The People v. Smith* (9 Cow. R., 258), an indictment for maliciously killing a cow was sustained, the court saying that the offense was distinguishable from an ordinary trespass in this, "that it is not only a violation of private right, without color or pretense, but without the hope or expectation of gain."

This, it seems to me, is a concise and correct statement of the true doctrine.

We come now to the case of *Loomis v. Edgerton* (19 Wend. R., 419), where the precise question raised in this case arose and was determined, the court holding that maliciously and secretly breaking in pieces a cutter was a criminal offense. Justice COWAN, after reviewing the authorities and approving of the decision in *People v. Smith* (*supra*), says the balance of authority was in favor of holding the offense to be criminal. Were it otherwise, in his expressive language, "it would be a sad exception to the general wisdom of the common law."

The case of *The People v. Kilpatrick* (5 Denio R., 277), and upon the authority of which we were told on the argument, the indictment in this case was quashed, I do not think is necessarily in conflict with *People v. Smith*, or *Loomis v. Edgerton*. The indictment in *Kilpatrick's Case* charged him with maliciously breaking in pieces two windows in a dwelling house. Doubt was expressed in that case whether, if the charge had been that the offense was *secretly* done, the indictment could not have been maintained. But larceny could not be predicated on the carrying away of property where the offender was first obliged to detach it from the freehold. Injury to the freehold was but trespass. Though the distinction may not be well taken, yet, such seems always to have been the law,

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except as changed by statute. I cannot agree that the indictments for killing domestic animals have been sustained upon features peculiar to such offenses, and as alone evincing a cruel and depraved mind, and that such cases are exceptional. Our legislature, it is true, has marked its abhorrence of such offenses by enacting that he who shall willfully administer poison to any cattle, horses or sheep, or shall expose poisonous substances with the intent that the same may be taken, may, on conviction, be punished by imprisonment in the State prison. (3 R. S., 5th ed., 969, § 16.) The offense which, by the common law, was a misdemeanor, may now be punished as a felony. Our statute, like the English statutes, has raised the grade of the offense. But equal depravity and wickedness may exist, and be the cause of malicious mischief, where there is no killing or maiming of domestic animals. The earliest English statute was directed against the villain who would break down the dikes and let in the wasting flood to sweep away the habitations and destroy the fields of the farmer. We have already seen that BLACKSTONE classes *malicious mischief* with the public crimes of England. As a public crime, as an offense tending to disturb the public peace, it is indictable. It would be a strange anomaly, indeed, if a prowling villain could enter on another's premises clandestinely and then secretly burn, waste and destroy any large amount of valuable personal property, and go unwhipt of justice, when, if he had carried away the value of twenty-five dollars, he would have been a subject for the State prison for a term of years. In my judgment we ought to follow the ruling in *Loomis v. Edgerton*, and hold that the wanton, malicious and secret destruction of personal property is a misdemeanor at the common law, and, therefore, indictable and punishable criminally. If my brethren agree with me, the order quashing this indictment should be reversed, and the prisoner should be required to appear and plead to the indictment.

Ordered accordingly.

NEW YORK GENERAL SESSIONS, JUNE, 1864. Before *Abraham D. Russell*, City Judge, and *John T. Hoffman*, Recorder.

THE PEOPLE v. ROBERT MURRAY *et al.*

An indictment in a State court for an offense against the penal laws of the State is not removable by the defendants, on petition, before plea, into the Circuit Court of the United States, under the provisions of section 5 of chapter 84 of the thirty-seventh Congress.

Congress has not the power to confer upon the United States courts jurisdiction to try indictments found in the State courts.

It is not enough that an act of Congress gives the United States Circuit Court jurisdiction of such a case. It can have no jurisdiction that is not conferred by the Constitution as well as by the law.

The *dictum* of Chief Justice MARSHALL, in *Osborn v. The United States* (9 Wheat., 821), declaring that Congress is capable of giving the Circuit Court of the United States original jurisdiction in any case to which the appellate jurisdiction extends, has no application to a case in the origin of which neither the Constitution nor laws of the United States are involved, and in which a question involving either may never arise, or, if it does, can only arise in the progress of the cause. By HOFFMAN, recorder.

THE defendants were indicted for the forcible seizure, imprisonment and abduction of one Arguelles, who, it was claimed, was secretly taken out of the country by the assistance of the defendants and conveyed to Cuba.

An application was made, in behalf of the defendants, for an order removing the indictment for trial to the Circuit Court of the United States, under the provisions of section 5 of chapter 84 of the acts of Congress of 1863. No plea had been put in by the defendants. The motion was founded on an allegation in the petition that the act in question was done by and under the order of the President of the United States.

William M. Ewarts and *James T. Brady*, for the prisoner.

I. The application is made under the provisions of the 5th section of the act of Congress, passed March 3, 1863, entitled, "An act relating to *habeas corpus*, and regulating judicial proceedings in certain cases." The papers upon which the motion is made show the case to be within the purview of that section. (12 Stat. U. S., 755.)

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II. As it is conceded that the laws of the United States within and conformed to the authority of the Constitution of the United States are paramount in all courts and jurisdictions, the motion must be granted, unless the section of the act in question is void for repugnance to the Constitution.

III. That no such repugnance exists, and that the act of Congress is valid, so far as it relates to the removal of a *civil suit* from the State court to the United States Circuit Court, has been adjudged, upon great consideration, by the general term of the Supreme Court of this district.

It is respectfully submitted that the question within the premises of that decision should not be deemed an open one in this court. (*Jones v. Seward. General Term, March 14, 1864: LEONARD, P. J., SUTHERLAND and CLERKE, JJ.*)

IV. The proposition upon which the act, in its relation to civil suits, was upheld as constitutional by the Supreme Court of this State, was that laid down and always adhered to by the Supreme Court of the United States in the case of *Osborn v. The Bank of the United States* (9 *Wheat.*, 821).

Chief Justice MARSHALL, in delivering the opinion of the court, says: "We perceive no ground upon which the proposition can be maintained that Congress is incapable of giving the Circuit Courts *original* jurisdiction in any case to which the *appellate* jurisdiction extends." (*Ut supra*, p. 821.)

V. As the section of the act in question, in terms, provides for the removal of *criminal* prosecutions from the State to the United States courts, the only question is, whether such provision is within the authority of the Constitution of the United States.

But, upon the adjudication of the Supreme Court of the United States, the answer to that question is to be sought in the answer to the question whether criminal prosecutions in the State courts, within the purview of this section of the act of 1863, are subject to the *appellate* jurisdiction of the Federal judiciary.

VI. That criminal prosecutions, wherein the question of guilty or not guilty turns upon an authority, right in justifica-

tion under a law in the Constitution of the United States, are within the appellate jurisdiction, cannot be doubted, either upon reason or authority.

1. Nothing can be more at variance with the paramount authority of the Federal government than that it should be possible that a man should be punished by a State court as a criminal for an act enjoined, permitted or justified as a duty or a right under the laws or Constitution of the United States.

To guard against this possibility, the appellate jurisdiction of the Federal judiciary is requisite and has been established.

2. The exercise of this appellate jurisdiction is familiar, and its constitutionality has never been judicially doubted or discredited. (*Cohens v. State of Virginia*, 6 *Wheat. R.*, 264; *Worcester v. State of Georgia*, 6 *Pet. R.*, 567; *Prigg v. Commonwealth Penn.*, 16 *Id.*, 539; *United States v. Booth*, 21 *How. R.*, 506.)

VII. As, then, it cannot be doubted that a writ of error will lie to review before the Supreme Court of the United States the final judgment of the highest court in this State, in the case in which the present application is made; so, it is established by the decision of the paramount tribunal that *original* jurisdiction may be conferred by Congress in the Circuit Court in such case.

By the act of Congress of March 3, 1863, such jurisdiction has been conferred on the United States Circuit Courts, and the manner and effect of a transfer to their jurisdiction provided.

A. Oakey Hall (District Attorney), for the People.

The defendant, who is United States marshal, has been indicted for the forcible seizure and confinement of one Arguelles, &c.

The alleged offense is one against the statutes of the State of New York, and is not against any Federal statute.

A motion is made to remove the indictment from the State Court into the United States Circuit Court for trial; and the application is based upon section 5 of chapter 81 of the Laws

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of 37th Congress (March, 1863). The supposed applicable provisions are as follows :

"SEC. 5. And be it further enacted, that if any suit or '*prosecution*,' civil or '*criminal*,' has been or shall be commenced in any State court against any officer, civil or military, or against any other person, for any arrest or imprisonment made, or other trespasses or '*wrongs*' done or committed, or any act omitted to be done at any time during the present rebellion, by virtue or under color of any authority derived from or exercised by or under the President of the United States, or any act of Congress, and the defendant shall, at the time of entering his appearance in such court, or if such appearance shall have been entered before the passage of this act, then, at the next session of the court in which such suit or '*prosecution*' is pending, file a petition, stating the facts, and verified by affidavit, for the removal of the cause for trial at the next Circuit Court of the United States, to be holden in the district where the suit is pending, and offer good and sufficient surety for his filing in such court, on the first day of its session, copies of such process and other proceedings against him, and also for his appearing in such court and entering special bail in the cause, if special bail was originally required therein. It shall then be the duty of the State court to accept the surety and proceed no further in the cause or '*prosecution*,' and the bail that shall have been originally taken shall be discharged. And such copies being filed, as aforesaid, in such court of the United States, the cause shall proceed therein in the same manner as if it had been brought in said court by original process, whatever may be the amount in dispute or the damages claimed, or whatever the citizenship of the parties, any former law to the contrary notwithstanding." * * * * *

L: This motion can be granted only through an unconstitutional application of the foregoing provisions.

1. If the prayer of the petitioner should be granted, a State will originally stand in the United States Circuit Court as plaintiff, with one of her own citizens as defendant.

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2. Such a primary status of parties, either in a civil or criminal controversy, is beyond the judicial jurisdiction granted by the Federal Constitution.

3. The constitutional test in an application to remove a controversy from a State to a Federal court, and confer upon the latter original jurisdiction is, could the controversy so removed have been originally commenced in the latter tribunal? (1 *Curtis' Commentaries on Jurisdiction*, § 148; *Conkling's Treatise on the Organization, Jurisdiction and Practice of the United States Courts*, 3d ed., p. 177; 17 *Johns. R.*, 21; *United States v. Latham*, 6 *Am. Law Journal*, p. 115; *Gale v. Babcock*, 4 *Wash. C. C. R.*, 200.)

4. Let us refer to the constitutional provisions. Art 3, § 2, is as follows:

"The judicial power shall extend to all cases in law and equity arising under this Constitution, the laws of the United States, and treaties made, or which shall be made under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States, between a State and citizens of another State, between citizens of different States, between citizens of the same State claiming lands under grants of different States, and between a State or the citizens thereof, and foreign States, citizens or subjects."

5. Here let it be conceded by us that whenever this controversy between the State and Murray involves a determination of constitutional questions adverse to Murray in the State tribunal of last resort, then the *appellate* jurisdiction of the national Supreme Court may be invoked by writ of error. But this discussion solely relates to a claim of *original* jurisdiction of the United States Circuit Court.

6. Under which of the foregoing provisions of the Constitution could the State of New York have entered this latter court, and have indicted Murray, her own citizen, for a State offense?

7. Whatever judicial jurisdiction is not granted by the

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Federal Constitution expressly, or by necessary implication to the Federal courts, exclusively belongs to the State courts. (1 *Kent*, 324.)

8. The relation of the States and the Federal government on this subject of judicial jurisdiction is, under the theory of our institutions, necessarily reciprocal. The former cannot prosecute for offenses against Federal statutes, and the latter cannot prosecute for offenses against State statutes. As cases "*arising* under the laws of the United States" must be originally litigated in national tribunals, so those *arising* under State law must be originally controverted in State tribunals. The national government is protected from State usurpation, and the States are made secure against Federal domination. The Supreme Court of the United States may be appealed to by the national or the State governments whenever either infringe upon the constitutional and appropriate functions of the other.

9. It is evident, from considering the theory of this relation, that, even when a constitutional status of parties exist, there may be no standing for them in the Federal courts for want of jurisdiction over the subject matter.

10. Hence, although a State sue an alien, the latter cannot always transfer the subject matter from the State to the Federal tribunal. Yet, in that case, there would be an apparent right of removal under the Constitution, because of a proper conjunction of parties.

11. The latter proposition was established in *Respublica v. Cobbett* (3 *Dallas R.*, 476), and the subject matter of the suit merely *savored* of criminality.

William Cobbett had been sued in an action of debt by the State of Pennsylvania, upon a broken recognizance for good behavior. He petitioned to have it removed, for trial, into the United States Circuit Court, on the ground that he was an alien, and, under the concluding sentence of section 2, article 3, *supra*, the removal was objected to. Messrs. Tilghman, Lewis and Rawle, of Pennsylvania, and Harper, of South Carolina, argued in favor of the removal. Messrs. Ingersoll

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and Dallas argued against it. There was color for the application, because Cobbett was a "foreign subject," and because he was defendant in action of debt. The court, *per* McKean, Ch. J., concludes its opinion as follows: "*But that neither the Constitution nor Congress ever contemplated that any court under the United States should take cognizance of anything savoring of criminality against a State: That the action before the court is of a criminal nature, and for the punishment of a crime against the State.* That yielding to the prayer of a petitioner would be highly inconvenient in itself, and injurious in the precedent; and the cognizance of it would not be accepted by the Circuit Court, if sent to them, for even consent cannot confer jurisdiction. For these reasons, and others, omitted for the sake of brevity, I conclude the prayer of William Cobbett cannot be granted."

12. Thus, an examination of the case of Cobbett shows that the court, although satisfied of the general rights of an alien to force his State antagonists into the Federal court, doubted his constitutional right so to do when the subject matter of the suit was an offense against State law. How much more should this court doubt the constitutionality of now removing a controversy wherein there is a defect of parties, with also a defect of subject matter?

II. So far as this State is concerned the question is an original one, and a recent decision of the Supreme Court in this district, approving a removal of an action from the State court into the United States Circuit Court, under the cited law of 1863, does not bind this court against entertaining the question.

1. The case of *Jones v. Seward*, wherein that decision was rendered (26 *How. Pr. R.*, 433), was one which could have been originally brought in the court to which it was removed, because there an individual plaintiff and an individual defendant came, and each were citizens of different States; hence, it fell within the provision of the Constitution allowing a citizen of one State to sue a citizen of another State in the United States court.

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2. And cases from other States, which may be cited as arising between individuals, fall within the same distinction.

3. Omitting the momentous and interesting considerations which arise from this attempt of the general government to control, if not to subvert State sovereignty, there was a bare legal apology for asking that *Jones v. Seward* should be removed because Federal legislation amply secured to the plaintiff his rights of procedure against the defendant, and there was in the court no defect of power to determine the controversy. But the act of 1863, under which this claim of removal is made, does not—to bridge a long chasm of intermediate difficulties—provide how the offender against a State statute shall be sentenced if convicted. In short, while the analogies of State procedure have been legislatively applied to *civil* suits when removed from State to Federal tribunals, none such have been applied to criminal prosecutions. **AND WHO COULD PARDON?**

III. But if there was not a failure of constitutional power respecting this motion, it should be denied for want of the necessary enabling legislation by Congress.

1. Because, even if a State may constitutionally be allowed to sue its own citizen civilly or criminally in a Federal court, as a matter of original jurisdiction the State must, nevertheless, be expressly authorized and enabled, by an act of Congress, to commence such suit. (*Per* WASHINGTON, J., *Gale v. Babcock*, 4 *Wash. C. C. R.*, pp. 200, 345.)

2. Congress may have intended, by the invoked section, to force a trial, by a Federal court, of State indictments against Federal officials, etc. Doubtless such a guardianship of Federal trespassers might prove agreeable and serviceable to the administration. But the intention is not carried out by the provisions. To effectuate it, something more of legislation is needed than an enactment to remove the criminal prosecution against an alleged Federal wrongdoer. There must be enabling legislation, which shall provide for the anomalous *status* of a State prosecuting a State offender in a national court. Had this been done, then there must have been further legislation which should provide for process to compel the offender's appearance,

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and also for an application of the State punishment by the Federal judge, to the conviction in a Federal court not permitted without express legislation to notice State procedure.

3. The statutes of 1863, as well as prior statutes, provide for the determination of private controversies, but not for the determination of such a controversy as is now at the bar of this court.

4. Is it not clear that, should this indictment be removed into the United States Circuit Court, the latter must remand it for want of these very provisions?

IV. Therefore, waiving all the interesting topics of argument and illustration which are suggested by the many startling provisions of the Federal statute in question, the conclusions of the court should be:

1. That the motion must be denied, because, to grant it, would be to make an unconstitutional application of the cited section.

2. That if no such constitutional barrier exists, the section does not warrant the motion in such a case as is now before the court.

3. That the defendant must answer the indictment.

A trial of this indictment appropriately raises, in an appropriate tribunal, this question: "Can Congress allow a Federal official to justify his unconstitutional trespass by pleading unconstitutional instructions of the President?"

No dispassionate citizen, will doubt that this momentous question should be impartially discussed and decided in these times of executive influence at the bar of a State court rather than at the bar of a Federal tribunal.

Amasa J. Parker, also for the People.

I. The simple question here is, whether original jurisdiction has been conferred on the Circuit Court of the United States by the act of 1863 (*ch.* 81).

We say it has not been so conferred, and could not be, because it is not permitted by the Constitution of the United States. This case is not included within any of the provisions

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of section 2, article 3 of the Constitution, which define the cases in which jurisdiction may be given.

It does not arise under the Constitution or laws of the United States, or under any treaty made by the United States. The act of Marshal Murray for which he is indicted, was not done, either by direction of the Constitution, or of an act of Congress or of a treaty. No such direction is set up in his justification. He only sets up an order of the President, and that is not a case provided for in the Constitution. The Constitution does not give jurisdiction in cases arising under orders made by the President.

II. As the Constitution has conferred on the United States courts no jurisdiction over such a question, the act of Congress can give none; for the jurisdiction cannot be enlarged by Congress. (*Marbury v. Madison*, 1 *Cranch R.*, 174; *Cohens v. Virginia*, 6 *Wheat. R.*, 264; *Conkling's Treatise*, 3d ed., 60, 138.)

III. It is true the act of Congress provides that an order of the President may be interposed as a *defense*. This does not necessarily bring in question the validity of the original transaction. Like the statute of limitations, it *may* be pleaded — it *may* be set up on the trial and it may not.

It will not do to say that by authorizing a defense to a wrongful act, the original act is authorized by implication. Absolute rights, including that of personal liberty, cannot be taken away without express enactments.

IV. But if the court thinks differently, and holds that a law of the United States is involved, because it has provided a defense, then we say a "case" under the law has not yet *arisen*." It is only when a "case *arises*," in the language of the Constitution, that jurisdiction can be given to the United States courts.

"A case arises within the meaning of the Constitution, whenever any question respecting the Constitution, laws or treaties of the United States, has assumed such a form that the judicial power is capable of acting upon it." (*Osborn v. United States Bank*, 9 *Wheat. R.*, 815; 5 *Cond. R.*, 785.)

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"That power is capable of acting only when the subject is submitted to it by a party who asserts his right in the form prescribed by law. It then becomes a case." (*Ourtis' Com. on Const.*, § 7.)

It must expressly appear by the record that one of the cases designated in the Constitution did arise in a State court, and was decided against the laws of the United States, or the United States courts can get no jurisdiction on appeal. (*Connell v. Randall*, 10 *Peters R.*, 363; *Cush. Treat.*, 3d ed., 57, and cases there cited; *Sudam v. Williamson*, 20 *How. Pr. R.*, 428.)

A case does not arise simply by the defendant's saying he wishes to interpose such a defense.

Nor even by a defendant pleading it among other defenses. Pleading only puts the defendant in a condition to raise the question on the trial. If he does not raise it, no question arises.

Suppose a defendant, sued for an arrest or other arbitrary act, plead, *first*, the general issue or a general denial of the complaint; *secondly*, *son assault demesne*; *third*, that he did the act by order of the President.

And, on such pleadings the cause, commenced in a State court, is removed into the United States Circuit Court on motion of the defendant.

On the trial the defendant succeeds on either his first or second plea, and no question is raised on his third plea. The United States Circuit Court would have no jurisdiction, either to render judgment or enforce the collection of it, because no case had arisen.

Or suppose a defendant swears that he intends to plead the order of the President, and on his affidavit gets the cause removed to the Circuit Court of the United States, and when there sets up no such defense, how can the United States Court get jurisdiction of the action? It can give no judgment, for no "case" has "arisen," and the defendant, getting the action removed to that court by a false pretense, would escape judgment. All the proceedings in that court would be *coram non judice* and void. The consent of the defendant, in removing

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the indictment to that court, could not give jurisdiction for "consent can never confer jurisdiction."

In case of an indictment, the error would be still plainer. If the indictment were removed to the United States Court on an affidavit, and no such defense was set up in that court, there would be no jurisdiction to convict or to punish.

A case does not arise unless it is *necessarily* involved in the action, or the question is actually raised on a trial.

When the plaintiff cannot maintain his action without necessarily raising the question of the validity of an act of Congress, a case has arisen giving jurisdiction to a United States Court when he brings his suit. Such it was in *United States Bank v. Osborn* (9 *Wheat. R.*, 738), where the right to sue in that court was given by an act of Congress, and thus the plaintiff had to encounter the question of the validity of that act of Congress at every step of his action.

The case, therefore, arose at the commencement of the action.

But where an act of Congress is only involved in a *defense*, and that not the sole defense, the case does not arise until the question is actually raised in court; and it is never certain it will be raised until it is actually raised.

When the evidence is offered in defense, and its availability decided by the court, the question is raised and the case arises.

All that is said by the court in 9 *Wheat. R.*, 738, is spoken only of cases like that, where the question necessarily arises with the commencement of the action. The meaning of what Chief Justice MARSHALL said, was simply that *the same subject matter which would give appellate, would also give original jurisdiction*. Upon this the court was misled, in the case of *Jones v. Leonard* (26 *How. R.*, 438). The attention of the court was not then directed to the distinction. It is undoubtedly true, that original jurisdiction may be conferred wherever there is appellate jurisdiction; but to confer the original jurisdiction, the case "must actually" arise. When the question is necessarily involved, or actually raised and submitted, the case arises, but under no other circumstances.

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V. The only constitutional course, therefore, is to proceed with the case in the State court. If no case arises involving the validity of an act of Congress, the State court has, of course, jurisdiction. So it has jurisdiction equally if such a case arises; and from an adverse determination of that question in the State court, the defendant has, by the Constitution, the right of appeal and review in the United States Supreme Court.

VI. Another and complete answer to this motion is, that the defendant is indicted for a statutory State offense, of which a court of the United States has and can have no jurisdiction. The punishment is prescribed by a State statute, and it can only be inflicted by a State court.

The governor only, and not the President, has power to pardon for a crime against the State. But the governor would have no power over a conviction in the United States courts. The complications and difficulties which would follow the removal of this indictment show its impossibility.

VII. The act of 1863, under which this removal is sought, is unconstitutional, and so it has been decided in other States. (*Griffin v. Wilcox*, 21 *Ind. R.*, 370; *State of Ohio v. Bliss*, 10 *Pittsburgh Law Journal*, 304.)

A more atrocious violation of the Constitution cannot be conceived, than this attempt to make the will of the President the law of the land, and to make his order a justification of every wrong, and a defense for every possible crime.

VIII. The act of Congress in question is, by its terms, only applicable to cases growing out of the rebellion, and it is not claimed that the transaction in question was, in any way, connected with the rebellion.

RUSSELL, *City Judge*. It was not controverted, on the argument against the defendants, that it was for acts claimed to be a violation of a criminal statute of this State that the indictment in this case was found. The ground taken was, that whatever violations of the laws of this State the defendants had committed proceeded from obedience to an order of the President of the United States, for which, under

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the act of Congress of March 3, 1863, they were not responsible to the tribunals of this State. The motion made, on the part of the defendants, was for an order of this court, sending the indictment to the next Circuit Court of the United States, for this district, in pursuance of section 5 of that act. The question is, is this court bound, or ought it to grant such a motion. At first blush, it would seem strange that the courts of this State had not the right to take cognizance of offenses against its laws, without reference to the social, political, official, or other standing of the parties charged. They certainly are the most appropriate tribunals to entertain such a jurisdiction. The State makes its own laws, and its courts should see that they are enforced. If justice is supposed to be administered without reference to position or complexion, or any other extraneous consideration, the defendants, it is fair to presume, will be treated as other citizens, entitled to the same rights, and subject to the same legal accountability. Without discussing the question of State sovereignty, it is not improper to refer to the instances showing that this State has been considered capable of impartiality to all, and proving that it has uniformly asserted its rights to vindicate and enforce its own laws. One is the celebrated case of *The People v. Croswell* (3 Johns. Cases, 336), where the defendant was indicted and committed for libel upon President Jefferson, in a newspaper published in the city of Hudson, in this State. The other is the familiar case of *The People v. McLeod* (1 Hill R., 377), where the Supreme Court of this State (composed of NELSON, Chief Justice, and BRONSON and COWEN, JJ.), remanded the defendant, upon *habeas corpus*, for trial upon an indictment for murder, though the act charged upon him had been adopted by the British Government (of which he was the subject), and had become the subject of diplomacy between that government and our own. If, notwithstanding these proceedings, Congress had the power to take away the jurisdiction of this court in the present case, and confer it upon the Circuit Court of the United States, and has done so, this court would readily yield its obedience to such a law. On the argument of the

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present motion, the prosecution discussed two points: *First*, as to the constitutionality of the act of March 3, 1863; and, *second*, as to whether, even if Congress could constitutionally enact such a law, the law as enacted was so framed, or worded, as to amount to a constitutional exercise of its power. Whatever may be my views upon the first point presented, I do not deem it necessary to pronounce upon that point, for it coincides with the views of the prosecution as to the second point urged. Assuming that the act as drawn, gives the Circuit Court of the United States the power to try the present indictment, it is not easily seen where that court would get the power to punish, in case of conviction, or who, in the event of conviction and sentence, would have the right to pardon. If we suppose that the present prosecution could be transferred to the Federal courts and could be directed to be there continued with the same effect as if it regularly proceeded in the courts of this State, that does not obviate the present difficulty. The trouble is, Congress has not so said, though the fifth section of the act uses these words: "That if any suit or prosecution, civil or military, has been, or shall be, commenced in any State, or court," &c., when it comes to provide for the powers of the Circuit Court over the matters removed to it, it uses terms applicable solely to civil proceedings. The provision is as follows: "And such copies (meaning of the process and proceedings against the party seeking the removal in the court of original jurisdiction), being filed as aforesaid, in such court of the United States, the case shall proceed therein in the same manner as if it had been brought in said court by original process, whatever may be the amount in dispute, or the damages claimed, or whatever the citizenship of the parties, any former law to the contrary notwithstanding." All the expressions in this sentence are such as are used to designate civil proceedings. Criminal proceedings are not commenced by original process, nor does the amount in dispute, nor do the damages claimed, nor does the citizenship of the parties at all affect them. Civil proceedings are affected by such matters. If it is granted that, in the outset

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of section five, Congress meant to transfer criminal as well as civil proceedings to the Federal courts in the cases named, it has only accomplished its intention in reference to civil proceedings. If the present indictment is transferred to the Circuit Court, the power to try it is not even given; and even if it is, expressly or impliedly, the power to punish is certainly not given, and that power cannot be exercised by implication. If this be the correct interpretation of this act, to transfer a criminal prosecution under its provisions to the Federal court would be to terminate it. A guilty party could not be punished. Such a law must be unconstitutional. The principle by which this act of Congress is to be construed is a severe one. No court of competent jurisdiction is to be interfered with in the assertion of its authority, unless the legislative power has so said in a law validly passed, and couched in plain, intelligible and unambiguous language. Under the judiciary act of September 24, 1789 (1 *Statutes at Large*, p. 73; § 12, p. 79), provision was made for the removal of certain civil actions, commenced in the State courts, into the Circuit Court of the United States, and the formula by which that was to be done was carefully prescribed. In this State, in *Redmond v. Russell* (12 *Johns. R.*, 158), it was held, as early as 1815, that this provision of the judiciary act of 1798 must, and would be, strictly adhered to and observed; that the one set of courts could not lose, nor could the other set acquire jurisdiction, but in the very mode prescribed. (*See, also, Conkling's Treatise*, 3d ed., 173, 174, 476, 480.) The Supreme Court of the United States has also held, that, if a cause is improperly removed to a Circuit Court, it is its duty to remand it to the State court. (*Follard v. Dwight*, 4 *Cranch R.*, 421.) Under the judiciary act of 1789, the proceedings for removal, as under the act in question, of 1863, are to take place in State courts.

Under the act to provide for the collection of duties on imports of March 2, 1833 (4 *Stat. at Large*, 632), the jurisdiction of the Circuit Courts of the United States was extended to all cases, in law and equity, arising under the revenue laws

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of the United States, and if any suit was commenced in a State court for any matter growing out of these laws, the application for its removal was directed to be 'by a petition to the appropriate Circuit Court. It would seem by this that Congress has had before its mind the subject, which of the two sets of courts should be the instruments through or by which the jurisdiction of one of them is to be transferred to the other. If, in some instances, the State courts are preferred, and, in others, the Federal, the argument is deducible that there is some reason for these respective preferences. There must be some amount of confidence and discretion reposed in both sets of courts in the performance of this duty. In *Gordon v. Longest* (16 *Peters R.*, 97), the Supreme Court of the United States held that the judge of a State court, to which an application is made for the removal of a cause into a court of the United States, must exercise a legal discretion as to the right claimed to remove the cause. As I understand this decision, the court is to be satisfied of two things: First, that the law under which the removal is sought is valid; and, secondly, that it has been literally adhered to in the steps taken to accomplish the removal. The discretion is not arbitrary, but must yield to the law. In this case I am not satisfied that the fifth section of the act of 1863, so far as it affects the transfer of criminal prosecutions from the State to the Federal courts, is valid, and must therefore deny the motion on the part of the defendants. This conclusion does not at all conflict with the judgment of the general term of the Supreme Court of this district, in the case of *Jones v. Seward* (26 *How. Pr. R.*, 433); nor does it conflict with the Constitution of the United States in its declaration that that instrument, and the laws made in pursuance of it and the treaties of the United States, shall be the supreme law of the land; nor with the provision that the judicial power of the United States shall extend to all cases, in law and equity, arising under that instrument, or the laws or treaties of the United States. The case of *Jones v. Seward* was a civil proceeding, and did not involve the question submitted to this court. As the Constitution of the United States does not

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execute itself, but becomes effective by the action of Congress, which body must pass the proper laws in execution of the powers it gives, the defendants cannot place themselves upon that instrument. This subject will be found fully considered in the matter of *Metzges* (1 *Brevard S. C. R.*, 248).

I came to the present conclusion more willingly because the defendants, on the trial of the indictment, can claim the benefit of the same legal principles and rules as would be applicable in the United States courts. The judiciary act of 1789 (4th *Statutes at Large*, 85, § 25), provides for the review, upon a writ of error, by the Supreme Court of the United States, of the final judgment or decree, in any suit, of the highest court of law or equity in any State, "where is drawn in question the validity of a treaty or statute of, or an authority exercised in, the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under, any State, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision is against their validity; or where is drawn in question the construction of any clause of the Constitution, or of a treaty or statute of the United States, and the decision is against the title, right, privilege or exemption specially set up or claimed by either party under such clause of the said Constitution." This provision of the judiciary act came under the consideration of the Supreme Court of the United States in *Cohens v. The State of Virginia* (6 *Wheat. R.*, 264), where it was discussed by Chief Justice MARSHALL in one of the most masterly opinions which ever emanated from his great mind. Should any injustice be done to the defendants by the courts of this State, it can be corrected in the mode designed by this provision of the judiciary act. No such apprehension ought to be indulged; for it can hardly be possible that this State, which has so promptly and effectually sustained every legal effort of the general government in the present emergency, will consent to do wrong to any of the agents of the general government for yielding obedience to any of its lawful commands.

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HOFFMAN, *Recorder*. The defendants have been indicted by the grand jury in and for the city and county of New York, for the forcible seizure and confinement of one Arguelles, in violation of the laws of the State of New York against kidnapping.

To this indictment no plea has been interposed by the defendants, but, under the provisions of section five of chapter eighty-four of the laws of the thirty-seventh Congress, they have presented a petition to this court, stating that the act complained of was done by order of the President of the United States, and asking, for that reason, that the indictment may be removed from this court into the United States Circuit Court for trial.

Section four of the act of Congress referred to provides that any order of the President, or under his authority, made at any time during the existence of the present rebellion, shall be a defense in all courts to any action or prosecution, civil or criminal, for any search, seizure, arrest or imprisonment made, done or committed, or acts omitted to be done, under and by virtue of such order, &c., and that such defense may be made by special plea or under the general issue; and section five of the act under which this application is made, is as follows:

"§ 5. *And be it further enacted*, That if any suit or prosecution, civil or criminal, has been or shall be commenced in any State court against any officer, civil or military, or against any other person, for any arrest or imprisonment made, or other trespasses or wrongs done or committed, or any act omitted to be done, at any time during the present rebellion, by virtue or under color of any authority derived from or exercised by or under the President of the United States, or any act of Congress, and the defendant shall, at the time of entering his appearance in such court, or if such appearance shall have been entered before the passage of this act, then, at the next session of the court in which such suit or prosecution is pending, file a petition stating the facts and verified by affidavit, for the removal of the cause for trial to the next Circuit Court of the United States, to be holden in the district where the suit

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is pending, and offer good and sufficient surety for his filing in such court, on the first day of its session, copies of such process and other proceedings against him, and also for his appearing in such court, and entering special bail in the cause, if special bail was originally required therein, it shall then be the duty of the State court to accept the surety and proceed no further in the cause or 'prosecution,' and the bail that shall have been originally taken shall be discharged. And such copies being filed as aforesaid, in such court of the United States, the cause shall proceed therein in the same manner as if it had been brought in said court by original process, whatever may be the amount in dispute or the damages claimed, or whatever the citizenship of the parties, any former law to the contrary notwithstanding."

I will not now discuss the character of this most remarkable legislation. At the proper time and in the proper place it will, I trust, receive the consideration and construction which it merits. The question of its constitutionality, except so far as it affects the question of the transfer of the indictment to the courts of the United States, is not involved in this motion, and I shall not examine here any question but the one at issue. Upon the argument of the motion the counsel for the defendant asserted that if the indictment should be removed to the United States Circuit Court, and a trial should be there had, followed by a conviction, that the judges of the United States Court could sentence the defendant, under the laws of the State of New York, to suffer the punishment prescribed by those laws, and that the power to pardon would rest in the President of the United States.

If these assertions were well founded, we should have the strange picture presented of a United States judge administering the penal laws of the State of New York, and the President of the United States extending a pardon to one convicted of a crime against the laws of that State, which had been committed by his own order. Such a result would seem to be more appropriate to an act entitled "An act to prevent the

punishment of any man who shall commit a crime by order of the President of the United States."

But I think these assertions of counsel are not well founded, and cannot be maintained.

There is no authority for saying that a judge of a United States court could sentence a criminal in pursuance of the laws of a State. Those judges have no powers except such as are conferred on them by the laws of the United States, under the Constitution of the United States. Congress has never conferred upon them the power to pass any sentence upon any criminal offender against the laws of a State. Even the act of 1863 is silent upon the subject, and no powers to that effect had ever been given before, because (if for no other reason) no one, until 1863, ever contemplated that a court of the United States would be called upon to try offenders against the criminal laws of a State.

If, then, this indictment were transferred, and the defense that the act complained of was done by the order of the President of the United States should fail, and the defendant should be convicted, no judgment whatever could follow upon that conviction.

Again, if a judgment could follow, no pardon could be extended to the offender; the President of the United States could not pardon, for the same reason that the offense is against the laws of the State, and not against the laws of the United States; and section two of article two of the Constitution of the United States confers upon the President the power to pardon and reprieve only for offenses against the United States.

That it did not confer upon the President the power to pardon offenders against the laws of a State, if convicted in a United States court, is perhaps a good argument to show that the framers of the Constitution never contemplated that an offender against the laws of a State should be tried in the courts of the United States.

The governor of the State of New York could not pardon, because this power, under the Constitution of the State, clearly relates only to cases of conviction in the courts of the State.

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It is very clear the framers of the Constitution never contemplated that any other courts would be clothed with power to enforce the State's penal laws.

Again, section 6 of the act of Congress above mentioned provides that any suit or prosecution described in that act, in which final judgment may be rendered in the Circuit Court, may be carried by writ of error to the Supreme Court, *whatever may be the amount of the judgment*. The closing words of this section show that it relates only to civil suits or proceedings, and *not to criminal*; and it is the only proviso on that subject in the act.

Now, it is well settled that the judgments of the United States Circuit Courts in criminal cases *are final*, and the Supreme Court possesses no appellate jurisdiction in such cases. (*United States v. Moore*, 3 Cranch R., 159; *ex parte Kearney*, 7 Wheat. R., 38; *ex parte Watkins*, 33 Pet. R., 193.)

It is only in cases where the Circuit judges are divided in opinion, that the case can be brought before the Supreme Court. (*Act of April 29, 1802.*)

If, therefore, this indictment remains in this court, and a question under the act of Congress of 1863 shall arise *in the progress of the cause*, the Supreme Court of the United States, in the exercise of its appellate jurisdiction, could ultimately review the judgment of this court, and pass upon the constitutionality of the law in question.

If, on the other hand, it is transferred to the United States Circuit Court, the question of the constitutionality or unconstitutionality of the law of Congress cannot be submitted to the adjudication of the Supreme Court of the United States.

These suggestions are, in my judgment, material to the question under consideration, because they tend to show, in the first place, that although the words of the act of 1863 are very broad, yet Congress could hardly be considered to have intended (even if they had the power to do so) to confer jurisdiction upon the United States court to try, in the first instance, an indictment found in a State court, inasmuch as they have wholly neglected to provide any way in which that jurisdiction

could be exercised, and in which the case could be prosecuted to judgment and execution; and inasmuch as the effect would be to deprive the Supreme Court of the appellate jurisdiction, in the exercise of which it could reverse the judgment of the State court, if the indictment was not removed.

In the second place, these suggestions tend to show that, even if Congress did so intend, it is not only an instance of legislation not contemplated by the Constitution of the United States, but it is so improvident and incomplete that no courts can give effect to it.

II. But, independent of these suggestions, Congress has no power, in my judgment, to confer upon the United States courts jurisdiction to try indictments found in the State courts.

The case of *Jones v. Seward*, decided in the Supreme Court in this district, is no authority in this case. I need not pause to state the difference in the two cases. They are wholly unlike.

The argument of the defendant's counsel is, that, upon the trial of this indictment, the consideration of a law of the United States will be involved; that, in every case arising under the laws of the United States, the courts of the United States have appellate jurisdiction to reverse the judgments of the State courts; and that, in all cases to which appellate jurisdiction extends, Congress has the power of conferring original jurisdiction. In support of this, he quotes the *dictum* of Chief Justice MARSHALL, in the case of *Osborn v. The United States* (9 *Wheat. R.*, 821), which is as follows:

"We perceive no grounds upon which the proposition can be maintained, that Congress is incapable of giving to the Circuit Court original jurisdiction in any case to which the appellate jurisdiction extends."

Whatever Chief Justice MARSHALL has said is entitled to the greatest respect, and I should hesitate about refusing to assent to it, if I could not find a warrant for such refusal in his own recorded declarations. I do find such warrant in his opinion in the case of *Cohen v. Virginia* (6 *Wheat. R.*, 264), in which he says:

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"It is a maxim, not to be disregarded, that general expressions, in every opinion, are to be stated in *connection with the case* in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit in which the very point is presented for decision."

Now, in the light of this maxim, I propose to show that what Chief Justice MARSHALL said in the case of *Osborn* has no application to, and is no authority in, the case now under consideration.

The Bank of the United States sued Osborn in the United States Circuit Court, by authority of its charter, which was under an act of Congress, and which gave the United States courts original jurisdiction of suits by and against the bank. The court decided that that provision in the charter was warranted by the third article in the Constitution, which declared that the judicial power of the United States should extend to all cases arising under the Constitution and "the laws of the United States." Judge MARSHALL said: "This suit is a case; and the question is, whether it arises under the laws of the United States;" and soon after he says: "The Constitution enumerates cases in which the jurisdiction of the United States courts is *original and exclusive*, and then defines *that which is appellate*;" and he adds as follows:

"It is not insinuated that the judicial power, in cases depending upon the character of the cause, cannot be exercised, in the first instance, in the courts of the Union."

And then he uses the words cited by defendant's counsel, and soon after uses this all-important language:

"We think, then, that when a question, to which the judicial power of the Union is extended, forms an ingredient in the original cause, it is in the power of Congress to give the Circuit Courts jurisdiction of that cause, although other questions of fact may be involved in it. The case of the bank is, we think, a very strong case of this description. The charter of incorporation not only gives it, but gives it every facility which it possesses."

"This being (meaning the bank) can acquire no right, make no contract, bring no suit, which is not authorized by a law of the United States."

"Can a being thus constituted have a case which does literally as well as substantially arise under the law?"

And in another place he says: "The act itself is the first ingredient of the case — its origin."

It was under such a state of facts, and in such case, that Judge MARSHALL gave utterance to the *dictum* quoted by defendant's counsel. It was applicable to such a case, and to every case where a question arising under an act of Congress is involved "in the character of the cause;" "forms an ingredient of the original cause;" exists in its very inception, and without the commencement of which the cause cannot proceed a single step.

It has no application to a case in the origin of which neither the Constitution nor the laws of the United States are involved, and in which a question involving either may never arise, or, if it does, can only arise "in the progress of the cause."

In the case of *Cohens v. Virginia*, above cited, we find Chief Justice MARSHALL furnishing an authority upon this point, when he says, as follows, viz:

"That the Constitution or a law of the United States is involved in a case, and makes a part of it, may appear in the progress of a cause, in which the courts of the Union, but for that circumstance, would have no jurisdiction, and which, in consequence, could not originate in the Supreme Court. In such a case, the jurisdiction could only be exercised in the appellate form."

In the same case, Judge MARSHALL says: "The original jurisdiction of the Supreme Court, where a State is a party, refers to those cases in which jurisdiction might be excluded in consequence of the character of the party, and an original suit might be brought in any of the Federal courts; not to those cases in which the original suit might not be initiated in a Federal court of the last description, in every case between a State and its citizens, and put off every case in which a State

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is enforcing its penal laws. In such cases, therefore, the Supreme Court cannot take original jurisdiction."

It needs no argument to show the application of these words of Judge MARSHALL to the case now under consideration, a case in which "the State of New York is seeking to enforce its penal laws," and which could not have been instituted in the courts of the Union. A case in which a question under a law of the United States may never be presented at all, or if it should be, can only be "in the progress of that cause." For an indictment by the people of the State of New York against one of its citizens, for an offense against its penal laws, does not involve in itself any question under any law of Congress. If such question should ever arise, it could only be on the progress of the defense. If it should then arise, and a decision should be had adverse to the law, the Supreme Court of the United States would, in the exercise of its appellate jurisdiction, reverse the judgment of the State courts. If it should not arise, then the courts of the United States could have no jurisdiction at all.

It is not enough that an act of Congress gives the United States Circuit Court jurisdiction. It can have no jurisdiction which is not conferred by the Constitution as well as by the law.

The construction which I contend for is, I think, just and reasonable. It secures to the State all its rights, and it secures to the Federal government all its merits, and all it has any right to demand. It secures to the State its right, in the first instance, to prosecute all offenders against its laws, in its own courts, and to insure them punishment in case of conviction.

It secures to the Federal government the right to review, in its Supreme Court, the judgment of the State courts, in all cases where a defense to an indictment arises under an act of Congress, if such defense should be overruled by the State courts. If the judgment of the State courts was erroneous, it would be reversed; if it was not, it would be affirmed, and the case would be remanded to the State court for judgment.

On the other hand, the construction of the Constitution contended for by defendant's counsel, would deprive the State

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courts of all power and right to enforce the penal laws, of the State, in all cases in which Congress should undertake to declare what should be a defense to them.

It would subject all the penal laws of a State to the will of Congress. It would, under the act in question, entitle any criminal indicted in our courts for any offense, to allege that he acted by order of the President, and to claim the removal of the cause into a court of the United States. It would, as I have shown, transfer an indictment for any offense against a State law, to a court organized under a United States law, which has no power to enforce the laws of the State, or to punish in accordance therewith. If the defendant, upon such transfer, could be tried and convicted, it would place him in a position to which no power of pardon could extend; and last, but not least, the transfer to the United States Circuit Court in the case now under consideration, or in any case else, would prevent hereafter the consideration by the Supreme Court of the United States, of the extraordinary act of Congress under which this motion to transfer has been made.

Considerations such as these may have influenced Judge MARSHALL, when he, in the case of *Cohens v. Virginia*, used the language I have before quoted, and they may also have influenced Chief Justice MCKEAN, when he declared, in *Respublica v. Cobbett* (8 Dallas R., 476), "That neither the Constitution nor the act of Congress, ever contemplated that any court under the United States should take cognizance of anything savoring of criminality against the State."

Believing, therefore, as I do, that the State of New York has the right, under the Constitution of the United States, to try in its own courts all offenders against its general laws, subject to the right of the United States Supreme Court to review their judgments, if, in the progress of the trial, a question should arise under any law of the United States, and believing, as I do, that Congress has no power to deprive the State of New York of that right, I concur in the decision of Judge RUSSELL denying the defendant's motion to transfer the indictment.

Motion denied.

SUPREME COURT. Monroe General Term, December, 1864.

Wells, E. D. Smith and J. C. Smith, Justices.

THE PEOPLE *v.* THE BRANCHPORT AND PENN YAN PLANK
ROAD COMPANY.

The object of a prosecution, by indictment, for nuisance to highways, is not the punishment of the defendant, but the repair of the highway, when it is out of repair, or the removal of the nuisance when the highway is obstructed.

An indictment for nuisance, against a plank road company, contained the allegation that the defendants' road was, and had been, and at, and until the finding of the indictment, still was out of repair, to the damage and common nuisance of the citizens of the State, so that they cannot go and pass over the same without great trouble, annoyance and inconvenience. *Held*, that to authorize a conviction, it was necessary to show, not only that the road had been out of repair, but that it continued so to be, down to the time of the finding of the indictment.

Form of an indictment for nuisance, in permitting a plank road to be out of repair, with counts under the statute and at common law.

THE defendant was indicted in the Court of Sessions of Yates county, for a nuisance, as follows :

State of New York, Yates County, ss :

The jurors of the People of the State of New York, and for the body of the county of Yates aforesaid, upon their oath, do present, that on the first day of January, in the year of our Lord one thousand eight hundred and sixty-three, there was, and from thence hitherto there hath been, a certain plank road, leading from near the village of Branchport, in the town of Jerusalem, in the county of Yates, to the village of Penn Yan, in the town of Milo, in the said county of Yates; commencing in the highway running easterly and westerly through the village of Branchport aforesaid, at or near a sluice-way in said highway, about twenty rods easterly of a point in said highway, near said village of Branchport, where the inlet of the Crooked Lake crosses the same highway, and passing the dwelling house of John M. Rose, in said town of Jerusalem, and passing through the village of Kinney's Corners, in said town, to the village of Penn Yan

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aforesaid, for all the good and worthy citizens of the State of New York to go, return, pass and repass, ride and labor, over and upon, with their horses, coaches, carts and carriages, paying lawful tolls therefor, whenever lawfully demanded, before that time built and constructed by the Branchport and Penn Yan Plank Road Company, an incorporation, duly incorporated under and pursuant to the statute entitled, "An act to provide for the incorporation of companies to construct plank roads, and of companies to construct turnpike roads," passed May seventh, one thousand eight hundred and forty-seven, and the several acts amendatory of the same, and then, and at all times since, in the possession, ownership and control of the said incorporation; which said incorporation, then, and at all times since, have enjoyed and do yet enjoy, the right and franchise of erecting toll-gates thereon, and at all times, when not lawfully restrained therefrom, pursuant to law, of demanding and receiving tolls, of and from all good and worthy citizens of the State of New York, going, returning, passing and repassing, riding and laboring, with their horses, coaches, carts and carriages, in and along the same, and which the said Branchport and Penn Yan Plank Road Company, then, and at all times since, have kept and maintained such toll-gates thereon, and when not lawfully restrained therefrom, demanded and received such tolls thereat; and on the day and year aforesaid, and at all times from thence until the day of taking of this inquisition, ought to have repaired and amended, and still of right ought to repair and amend their said plank road, when, where, and as often as it should or might be necessary to amend and repair the same, and then, and at all times since, were under obligations to make, secure, and maintain a smooth and permanent road, the track of which should be composed of timber, plank, or other hard material, or broken stone, gravel, shells, or other hard material, so that the same should form a hard and even surface, whereby they should keep a good and substantial road.

And the jurors aforesaid, upon their oath aforesaid, do further present, that on the twenty-eighth day of February, in

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the year of our Lord one thousand eight hundred and sixty-three, one Ambrose F. Stark, late of the town of Jerusalem, in the said county of Yates, did, at the said town of Jerusalem, present to Daniel Lanning, John C. Fitzwater and Erastus Cole, inspectors of plank road and of turnpike road for the said county of Yates, duly appointed, sworn and authorized to act as such, a complaint in writing, that the plank road aforesaid was then out of repair, signed by the said Ambrose F. Stark, which said complaint in writing is in manner and form as follows, that is to say :

"To Daniel Lanning, John C. Fitzwater and Erastus Cole, inspectors of plank road in the county of Yates and State of New York, that I, the subscriber, residing in the village of Branchport, in the county of Yates, do hereby complain that the Branchport and Penn Yan Plank Road, in the county of Yates, leading from Penn Yan to Branchport, is greatly out of repair, is in a rough and almost impassable condition, so much so that no tolls ought to be collected thereon, and the gates ought to be opened and kept open until said road is put in condition required by law for the collection of tolls.

"A. F. STARK.

"Dated Branchport, Feb. 28, 1863."

That thereupon the said Daniel Lanning, John C. Fitzwater and Erastus Cole, as such inspectors as aforesaid, did then and there, on the day and in the year and at the place last aforesaid, without delay, view and examine the said plank road so complained of, and did thereupon find the said claim and complaint to be just ; and did thereupon, upon due examination by them had, without delay, discover and determine that the said plank road was then out of repair, and as such inspectors as aforesaid, did, pursuant to such discovery and determination, thereafter, that is to say : on the fourth day of March, in the year one thousand eight hundred and sixty-three, at the town of Jerusalem, in the said county of Yates, give notice in writing, signed by the said Daniel Lanning and Erastus Cole, two of the said inspectors, bearing date on the day and year last aforesaid, to one of the directors of the said the Branch-

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port and Penn Yan Plank Road Company, which said notice is in manner and form following, that is to say :

To the Directors of the Branchport and Penn Yan Plank Road Company :

Messrs. — You will please take notice that complaint in writing has been made to us that the above road is out of repair, and is not in accordance with the statute, and we have this day viewed and examined the whole of said road and find said complaint to be just, and that said road is out of repair more or less over its entire length, and have ordered all the gates upon said road to be thrown open, on and after the 7th day of March, 1863, and no tolls to be collected thereupon until said road is put in proper condition and said gates are properly closed by due course of law. We cannot specify all the places which are not in accordance with the statute, for want of time ; we therefore use general terms. You are hereby required to put the said road in proper repair, according to the act in relation to plank roads, passed April 14, 1855, within twenty days from the date hereof.

Given under our hand, at Jerusalem, this 4th day of March, 1863.

DANIEL LANNING,
ERASTUS COLE

Inspectors of plank roads for Yates county.

By personal service of the said notice upon such one of the directors of the said the Branchport and Penn Yan Plank Road Company, whereby the said inspectors did require the said plank road aforesaid, of the said incorporation, in the said notice specified, to be repaired as therein specified, and within the time therein above stated, by the said Branchport and Penn Yan Plank Road Company. Yet the said the Branchport and Penn Yan Plank Road Company, on the said fourth day of March, in the year one thousand eight hundred and sixty-three, and at all times within the twenty days then next succeeding, and at all times since up to the day of the taking this inquisition, to wit, at the said town of Jerusalem, in the

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said county of Yates, have utterly and unlawfully neglected to obey the requisitions of the said notice, requirement and order, to repair their said plank road so complained of, determined to be out of repair, and required to be repaired as aforesaid, and on the fourth day of March aforesaid, and at all times since up to the day of taking this inquisition, the said plank road being about seven miles in length, and about thirty-five feet wide, was and has been, and still is, very ruinous, broken, soft, uneven, rough, rutty, full of broken planks and scantling, presenting a soft and uneven surface of earth and loam, and inconvenient to travel upon, and in great decay for the want of due and necessary amendment and reparation of the same, so that divers good and worthy citizens of the State of New York, in and along the same, with their horses, coaches, carts and carriages (paying lawful tolls therefor whenever lawfully demanded), could not, during the time aforesaid, nor yet can go, return, pass and repass, ride and labor, without great danger of their lives and loss of their goods, and great trouble, annoyance and inconvenience, to the great damage and common nuisance of all the good and worthy citizens of the State of New York, on and over the said plank road, going, returning, passing, riding and laboring, contrary to the form of the statute in such case made and provided, and against the peace of the People of the State of New York and their dignity.

And the jurors aforesaid, upon their oath aforesaid, do further present, that on the sixth day of June, in the year of our Lord one thousand eight hundred and sixty-three, at the town of Jerusalem, in the said county of Yates, one John Laird and divers other good and worthy citizens of the State of New York, residing in the said county of Yates, did, at the town of Milo, in the said county of Yates, present to Erastus Cole and Daniel Lanning, two of the inspectors of plank roads and of turnpike roads in and for the said county of Yates, duly appointed, sworn and authorized to act as such, a complaint in writing, that the plank road aforesaid was then out of repair, signed by the said John Laird and the said divers other good and worthy citizens of the State of New York, which said

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complaint in writing is in manner and form following, that is to say:

To Daniel Lanning and Erastus Cole, inspectors of plank roads in the county of Yates:

Dear Sirs — The undersigned, citizens of the town of Jerusalem, hereby complain of the Branchport and Penn Yan Plank Road Company, that their road is rough and uneven, and not in such condition as to legally entitle them to collect tolls on said road, and ask you to examine said road and order the opening of the gates until the road is repaired.

B. SHEARMAN,
P. PARKER,

JOHN LAIRD,
MELI TODD,

CHARLES H. VAIL

Dated, Jerusalem, June 6, 1863.

That thereupon the said Daniel Lanning and Erastus Cole, as such inspectors as aforesaid, did then and there, on the day, and in the year, and at the place last aforesaid, without delay, view and examine the said plank road so complained of, and did thereupon find the said claim and complaint to be just, and did thereupon, upon due examination by them, had without delay, discover and determine that the said plank road was then out of repair, and, as such inspectors as aforesaid, did, pursuant to such discovery and determination thereafter, that is to say: on the ninth day of June, in the year one thousand eight hundred and sixty-three, at the town of Jerusalem, in the said county of Yates, give notice in writing, signed by said inspectors, bearing date on the day and year last aforesaid, to one of the directors of the said the Branchport and Penn Yan Plank Road Company, which said notice is in manner and form following, that is to say:

To Miles B. Andruss, one of the directors of the Branchport and Penn Yan Plank Road:

Complaint having been made by Bradley Shearman, John Laird and others, to the undersigned, plank road inspectors of the county of Yates, that the Branchport and Penn Yan Plank Road is out of repair, and we, having examined the same, do

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find that said road is out of repair more or less on the whole length of the road. You are therefore notified to repair the same, according to law, within three days from the date hereof, or we shall serve notice on you to open the gates on said road within three days, and let the same remain open, without taking toll on said road until the same shall be repaired according to law.

ERASTUS COLE,
DANIEL LANNING,

Dated 9th June, 1863.

Inspectors.

By personal service of the said notice in writing upon the said Miles B. Andruss, one of the directors of the said the Branchport and Penn Yan Plank Road Company, whereby the said inspectors did require the said plank road aforesaid, of the said incorporation, in the said notice specified, to be repaired as therein specified, and within the time therein above stated, by the said the Branchport and Penn Yan Plank Road Company. Yet the said the Branchport and Penn Yan Plank Road Company, on the said ninth day of June, in the year one thousand eight hundred and sixty-three, and at all times within the three days then next succeeding, and at all times since up to the day of the taking of this inquisition, to wit, at the said town of Jerusalem, in the said county of Yates, have utterly and unlawfully neglected to obey the requisitions of the said notice, requirement, and order to repair their said plank road so complained of, determined to be out of repair, and required to be repaired as aforesaid; and on the ninth day of June aforesaid, and at all times since, up to the day of the taking this inquisition, the said plank road being about seven miles in length, and about thirty-five feet wide, was, and has been, and still is very ruinous, broken, soft, uneven, rough, rutty, full of broken planks and scantling, presenting a soft and uneven surface of earth and loam, and inconvenient to travel upon, and in great decay for the want of due and necessary amendment and reparation of the same, so that divers good and worthy citizens of the State of New York, in and along the same, with their horses, coaches, carts and carriages (paying lawful tolls therefor, whenever lawfully

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demanded), could not during the time aforesaid, nor yet can go, return, pass and repass, ride and labor, without great danger of their lives and loss of their goods, and great trouble, annoyance and inconvenience, to the great damage and common nuisance of all the good and worthy citizens of the State of New York, on and over the said plank road going, returning, passing, riding and laboring, contrary to the form of the statute in such case made and provided, and against the peace of the People of the State of New York and their dignity.

And the jurors aforesaid, upon their oath aforesaid, do further present, that on the first day of January, in the year of our Lord one thousand eight hundred and sixty-three, and from thence hitherto, there hath been a certain plank road leading from near the village of Branchport, in the town of Jerusalem, in the county of Yates, to the village of Penn Yan, in the town of Milo, in the said county of Yates, commencing in the highway running easterly and westerly through the village of Branchport aforesaid, at or near a sluice-way in said highway, about twenty rods easterly of a point in said highway, near said village of Branchport, where the inlet of the Crooked Lake crosses the same highway, and passing the dwelling house of John N. Rose, in said town of Jerusalem, and passing through the village of Kinney's Corners, in said town, to the village of Penn Yan aforesaid, for all the good and worthy citizens of the State of New York to go, return, pass and repass, ride and labor, with their horses, coaches, carts and carriages, paying lawful tolls therefor, before that time built and constructed by the Branchport and Penn Yan Plank Road Company, an incorporation duly and lawfully incorporated, and then and there being a lawful body corporate, and then and at all times since in the possession, ownership and control of the said incorporation, to wit, at the town of Jerusalem, in the said county of Yates, and at the said town of Milo, which said incorporation then and at all times since did enjoy, have enjoyed, and as yet do enjoy the lawful right and franchise of erecting toll gates thereon, and of demanding and receiving tolls of and from all the good

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and worthy citizens of the State of New York, going, returning, passing, repassing, riding and laboring, with their horses, coaches, carts and carriages, in and along the same, and which said incorporation then and at all times since, have kept and maintained such toll-gates thereon, and demanded and received such tolls thereat whenever not therefrom lawfully restrained; and on the day and year aforesaid, and at all times from that time to the day of the taking of this inquisition, at the said town of Jerusalem, in the said county of Yates, ought to have repaired and amended, and still ought to repair and amend the said plank road, when, and as often as it should, or shall, or may be necessary, and that a certain part of the said plank road, lying and being in the said town of Jerusalem, in the said county of Yates, extending from the toll-house and gate near Uriah Hanford's dwelling house, in the said town of Jerusalem, to the western terminus of the said plank road, at or near the aforesaid sluice-way in the highway aforesaid, and about twenty rods easterly of the said point in said highway, where the said inlet of the Crooked Lake aforesaid crosses the same highway, being about six miles in length, and thirty feet in breadth, was, on the ninth day of June aforesaid, in the year one thousand eight hundred and sixty, there and from thence at all times since until the finding of this indictment, at the said town of Jerusalem, hath been and still is very ruinous, miry, deep, broken, and presenting a soft, rough and uneven surface, and in great decay for the want of due and necessary amendment and reparation of the same, so that divers good and worthy citizens of the State of New York, in and along the same plank road, with their horses, coaches, carts and carriages, paying lawful tolls therefor, whenever lawfully demanded, could not during the time and times aforesaid, nor yet can go, return, pass and repass, ride and labor, without great trouble and annoyance, and inconvenience, and great danger of their lives and loss of their goods, to the great damage and common nuisance of all the good and worthy citizens of the State of New York, over the said plank road, going, returning, passing and repassing, riding and laboring,

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and against the peace of the People of the State of New York and their dignity.

And the jurors aforesaid, upon their oath aforesaid, do further present, that on the first day of January, in the year of our Lord one thousand eight hundred and sixty-three, and from thence until the day of the taking this inquisition, all that part of the said plank road of the said the Branchport and Penn Yan Plank Road Company, to wit, at the town of Milo, in the county of Yates, between the village of Penn Yan and the dividing line between the towns of Milo and Jerusalem aforesaid, where said dividing line crosses the said plank road, being about one mile in length and thirty feet in breadth, was, has been, and still is, very ruinous, miry, deep, broken, full of holes, presenting a soft and uneven surface, full of water, containing soft and rotten plank and timber, and in great decay for want of due and necessary amendment and reparation of the same, so that divers good and worthy citizens of the State of New York, in and along the same with their horses, coaches, carts and carriages, paying lawful tolls therefor, whenever lawfully demanded, could not, during the time aforesaid, nor yet can go, return, pass and repass, ride and labor, without great danger to their lives and loss of their goods, and great trouble, annoyance and inconvenience, to the great damage and common nuisance of all the good and worthy citizens of the State of New York, over the said plank road going, returning, passing and repassing, riding, and laboring, against the Peace of the People of the State of New York and their dignity; and that the said the Branchport and Penn Yan Plank Road Company may amend and repair their said plank road whenever, wherever, and as often as it shall be necessary.

JOHN D. WOLCOTT, *District Attorney.*

The defendant pleaded not guilty, and the issue was tried at the Court of Sessions, of Yates county, in November, 1863.

The evidence being closed, the court charged and instructed the jury as follows: That the defendant being a corporation,

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and having undertaken to build and maintain a plank road, were bound to keep it substantially as required by the statute.

The following section was then read by the court to the jury :

“ Every plank road made by virtue of this act, shall be laid out, at least four rods wide and shall be so constructed as to make secure, and maintain a smooth and permanent road ; the track of which shall be of timber, plank, or other hard material, so that the same shall form a hard and even surface, and be so constructed as to permit carriages and vehicles conveniently and safely to pass on and off where said road intersects other roads.”

The court then read to the jury the 7th section of the act of 1855, Laws of 1855, 1045, as follows :

“ Any plank road company or turnpike company within this State, which shall have once laid their road with plank may hereafter relay the same, or any part thereof, with broken stone, gravel, shell, or other hard material, whereby they keep a good and substantial road. Such company shall be entitled to collect and receive the same tolls as is provided by chapter 45 of the Laws of 1853.”

The court then remarked that the last section read modified the first one; that if the defendant had changed the whole of their plank to broken stone or gravel, all that could be required of them was, that they should keep and maintain a good and substantial road as required by the last section last read. But in this case the question arises, inasmuch as a portion of the defendant's road is still laid with plank, and a part only relaid with broken stone and gravel, whether the defendant was not bound to keep and maintain a smooth and even surface in such part of their road as still remained laid with plank, or whether they were bound to keep only a good and substantial road, as required by the statute of 1855, read to them. That, as a matter of law, the court instruct the jury that the defendants were bound to keep the part of their road remaining laid with plank, so that the same should be substantially as required by the section of the statute first read ; that it was

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not sufficient for them to keep that part of their road a good and substantial road, as required by the section last read to them; they were bound to keep the part remaining laid with plank substantially as required by the statute first read in evidence, so as to keep a hard and even surface; that if from the evidence they should find that the defendant had failed to keep their road as required by the provisions of the statutes, as thus explained, or if they should find that the defendant suffered or permitted their road to remain out of repair for an unreasonable length of time, at any time within the time laid in the third and fourth counts of the indictment, they should find the defendant guilty under those counts.

The counsel for the defendant then requested the court to charge and instruct the jury that before they would be warranted in finding the defendant guilty under either the third or fourth counts in the indictment, they must find from the evidence that the defendant suffered and permitted some particular part of their road to be out of repair at some time within the time laid in the third and fourth counts in the indictment, and that such part so found by them to be out of repair, continued and remained out of repair down to the time of finding the indictment.

The court refused to charge and instruct the jury as requested by the counsel for the defendant, and further charged and instructed the jury: That it was not necessary for them to find that the defendant's road was out of repair at the time of finding the indictment, in order to warrant a conviction; that if they should find that the defendant suffered and permitted their road to be out of repair for an unreasonable length of time at any time within the time laid in the third and fourth counts in the indictment, although it may have been repaired before the finding of the indictment, they should find the defendant guilty; that if they should be satisfied that the defendant, at any time in the month of June, after the time laid in the indictment, suffered or permitted that part of their road, described in the third count, to be and remain out of repair for an unreasonable length of time,

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although repaired by the defendant at the time of finding the indictment, yet they should find them guilty under the third count; and so in respect to that portion of the road described in the fourth count.

The counsel for the defendant excepted to so much and such part of the charge as instructed the jury that the defendants were bound to keep that part of their road, which remained laid with plank, substantially as required by the first section of the statute read to them.

And the counsel for the defendant excepted to the refusal of the court to charge and instruct the jury as requested by the defendant's counsel.

The defendant also excepted to all that part of the charge of the court given after the request and refusal to charge.

The jury found the defendant guilty as charged in the third and fourth counts in the indictment, and not guilty as to the other counts.

The proceedings were removed to this court for review by *certiorari*.

David B. Prosser, for the defendant.

I. The court erred in charging the jury that the defendants were bound to keep that part of their road remaining laid with plank substantially as required by the statute read, and that it was not sufficient for them to keep that part of their road a good and substantial road, &c. Because,

1st. The act of 1855 expressly authorized the defendants to relay their road, or any part thereof, with broken stone, gravel, or other hard substance, so as to keep a good and substantial road, and changed the rate of tolls. It is supposed the plank would come within the term, "other hard substance," and the defendants might use plank, or any other hard substance, provided they keep a good and substantial road.

2d. If the road was a good and substantial one, the allegation in the indictment that the road was ruinous, &c., was negatived, and the defendants should have been acquitted. All that the defendants were required to meet, was the charges

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in the indictment. Unless they were sustained by the evidence, the defendants should have been acquitted.

3d. The question presented by the indictment was, not whether the defendants had kept their road substantially as required by the statute, but the question was, whether the defendants' road was in a ruinous condition, as charged in the indictment. Under the charge of the court, the jury would have been warranted in finding the defendants guilty, although they may have been satisfied, from the evidence, that the defendants had kept a good and substantial road.

II. The court erred in refusing to charge as requested by the defendants' counsel, and in all that part of the charge given after the request. Because,

1st. The remedy by indictment for not repairing roads, is intended and given for the purpose of compelling repairs. (1 *Russ. on Cr.*, 307, 317, 336.) It follows that, if the object of the prosecution is to compel repairs — that if none are wanting at the time of presentment — the prosecution must fail.

2d. All the authorities agree that one of the essential averments in all indictments for not repairing is, that the road is out of repair; not that it was, or has been, but that it is, out of repair. (*Russ. on Cr.*, 366, 367; *Roscoe Cr. Ev.*, 571, 576; *Chil. Cr. Law*, 576-579; 1 *Strange R.*, 180-183; 2 *Saund. R.*, 158, note 3.)

3d. The charge in the indictment is, that, on the 6th day of June, 1863, and from thence until the finding of the indictment, the road had been, and still was, very ruinous, &c. The substance of this allegation should have been proven; yet the charge, in effect, instructs the jury that they might find the defendants guilty of the charge without proof.

The jury have found the defendants guilty, as charged in the third and fourth counts, thereby finding that the road was, on the 9th day of June, and until the finding of the indictment, in a ruinous condition, as alleged.

This they were justified in finding, under the charge, although they may have been fully satisfied, from the evidence, that, at

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the time of finding the indictment, the road was in perfect order.

John D. Wolcott (District Attorney), for the People.

I. There was no error in the charge "that the defendants were bound to keep that part of the road, which remained laid with plank, substantially as required by the first section read to them." (*The People v. Kingston & Middletown Turnpike R. Co.*, 23 *Wend. R.*, 205, 211.)

The public had a right to require something more of the defendants than that the portion of the road remaining laid with plank should be merely a good and substantial road, as required by the last section read to the jury.

It might be both a good and substantial road, though the defendants had contracted its width one-half, and might be so, though not so constructed as to make secure and maintain a smooth and permanent road, with a hard and even surface; and might also be a good and substantial road, though so constructed as not to permit carriages and vehicles conveniently and safely to pass on and off, where the road intersects other roads; but it would cease to be the road which the defendants were bound to furnish the public, and would be far less commodious. To constitute a nuisance, it is not necessary that the road should be unsafe or impassable. Any contracting or narrowing of a highway is a nuisance. (1 *Russ. on Cr.*, 350.)

Any obstruction left in the road, or omission to repair it, whereby it is less convenient for public use, falls within the same category. The public had a right to have that part of the road remaining laid with plank, continued substantially in the same manner, as to width and safety, which the charter required at its first construction, until the defendants should relay the same with broken stone, gravel, shell or other hard material, whereby they keep a good and substantial road.

If the court should not concur in the law of that part of the charge, it does not necessarily follow that it must set aside the verdict. The evidence did not make a case for laying down the law as to the manner in which the defendants were bound

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to keep that part of the road which remained laid with plank; and an error of the court, concerning an abstract proposition, having nothing to do with the matter in hand, is not sufficient ground for reversing a judgment. (*Shorter v. People*, 2 Comst. R., 202; *People v. Wiley*, 3 Hill R., 194, 213, 214.)

The law concerning bill of exceptions is the same in criminal as in civil cases. (*The People v. Wiley*, 3 Hill R., 194, 214.)

II. The request to charge does not state correct law. When a cause of forfeiture has once arisen, whether by non-feasance or otherwise, no case nor dictum can be found that it shall be legally atoned for by subsequent good behavior. The argument goes to prove that a corporation may practice all manner of abuse, by commission or omission, if it be careful to stop before the People can institute a prosecution. (*The People v. Hillsdale & Chatham Turnpike R. Co.*, 23 Wend. R., 258.)

III. To sustain a general exception to a part of a charge, the whole part thus excepted to must be shown to be erroneous. I cannot see that any part of the charge, given after request and refusal to charge, contains error.

A bill of exceptions only raises questions of law. (15 Wend. R., 581.)

By the Court, E. DARWIN SMITH, J. The defendants were convicted on the trial under the third and fourth counts of the indictment, and acquitted under other counts. The third and fourth counts were counts at common law, for a nuisance, in suffering their road to be out of repair. These counts both alleged that the defendant's road was, and had been, and still was, at and until the finding of said indictment, out of repair, to the damage and common nuisance of the citizens of the State, so that they cannot go, return and pass over the same, without great trouble, annoyance and inconvenience. On the trial the defendant's counsel requested the presiding judge to instruct and charge the jury that before they would be warranted in finding the defendant guilty under either the third or fourth count in the indictment, they must find from the evidence that the defendant suffered and permitted some par-

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ticular part of their road to be out of repair at some time laid in the third and fourth counts in the indictment, and that such part so found to be out of repair, continued and remained out of repair down to the time of finding the indictment. The court refused to charge and instruct the jury as requested by the counsel, but, on the contrary, charged them that it was not necessary for them to find that the defendant's road was out of repair at the time of the finding of the indictment in order to warrant a conviction, and that if the defendant had suffered their road to be out of repair, although it may have been repaired before the finding of the indictment, they should find the defendants guilty. To the charge as made, and to the refusal to charge as requested, the defendant's counsel duly excepted. These exceptions, I think, both well taken. The request to charge was nothing more than a request to the court to require the People to sustain by proof the material allegations of the indictment, or allegations without which the indictment would have been clearly demurrable. The object of the prosecution by indictment for nuisance to highways, is not for the punishment of the defendant, but the repair of the highway, when it is out of repair, or the removal of the nuisance when the highway is obstructed. (3 *Chitty's Cr. L.*, 575; 1 *Russ. on Cr.*, 355.) The judgment in such cases is that the defendant pay a fine and abate the nuisance. (*Id.*; *Bac. Abr., Nuisance*, 49, and *Term R.*, 142, 143.) In 1 *Russ. on Cr.*, 356, it is said: "In order to warrant a judgment for abating a nuisance, it must be stated in the indictment to be *continuing*, as otherwise such judgment would be absurd." It follows, if such allegation was essential to maintain the indictment, it was error in the court below to hold that it need not be proved when contained in the indictment. The exceptions to the refusal of the judge to charge as requested, and to his charge in distinct conflict with such request, were, therefore, well taken, and the conviction below must, for that reason, be reversed, and a new trial directed in the Court of Sessions of Yates county, and the case remitted for that purpose.

SUPREME COURT. Albany General Term, September, 1864.

Peckham, Miller and Ingalls, Justices.

WILLIAM WILLIS, plaintiff in error, *v.* THE PEOPLE, defendants in error.

On the trial of an indictment for murder, the defense interposed was insanity.

The judge charged, "that a man is not insane who knows right from wrong; who knows the act he is committing is a violation of law, and wrong in itself."

Held, on review, that the charge was not erroneous.

Charge of Mr. Justice PECKHAM on a trial for murder.

Where there has been a conviction in a Court of Oyer and Terminer, and judgment has been stayed, the proceedings may be removed into the Supreme Court for review by *certiorari*: Where there has been a conviction and judgment, the proceedings can be removed into the Supreme Court for review, only by writ of error.

The Supreme Court has no jurisdiction to entertain a motion for a new trial, on the ground of an irregularity which does not appear upon the record; but, after a writ of error has been returned, and not before, affidavits may be read upon the argument to correct an error arising out of an irregularity prejudicial to the rights of the prisoner, which does not appear on the record, and where he has no other legal mode of redress. *Per INGALLS, J.*

But a conviction will not be set aside and a new trial granted, when it is apparent that no injury has resulted to the prisoner from the alleged irregularity.

A writ of error having been brought, and a return made after conviction and sentence, in a capital case, affidavits were presented tending to show that S., one of the jurors, who had agreed to the verdict of guilty, had, before the trial, expressed the opinion that the prisoner was guilty and ought to suffer death; and that such expression of opinion was unknown to the prisoner and his counsel at the time of the trial. In opposition, the affidavit of the juror was read, denying fully and explicitly that he had ever formed or expressed any opinion, and other affidavits were read in corroboration. Upon a full examination of the affidavits, it was held that there was no ground for complaint on the part of the prisoner, and the application was denied and the judgment affirmed.

THE prisoner was indicted for the murder of Mary E. Phelan, and pleaded not guilty. The trial took place at the Ulster Oyer and Terminer, in March, 1864, Mr. Justice PECKHAM, presiding.

The killing of Mrs. Phelan by the prisoner on the 9th of April, 1863, near Ellenville, in the county of Ulster, was

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clearly proved. Her death was caused by cutting her throat with a knife. The physician who examined the deceased after death testified: "The wound was in her neck, from ear to ear, cutting the blood vessel, œsophagus, the trachea, both jugular veins, the external and internal carotid arteries, cutting down almost to the vertebræ; by looking at the trachea, there were at least three gashes."

The leading facts of the case, and the nature of the defense attempted, sufficiently appear from the charge of the judge and the opinion of the court.

After the testimony was closed, the court charged the jury as follows:

The prisoner at the bar, gentlemen, stands indicted and is now on trial before you for the murder of Mary Phelan. Such trials, gentlemen, are always serious, whether contested or not, however plain, however clear. They are always painful, and they are solemn — solemn in their results and solemn in their investigation. But, however painful, it is our duty to go through with the examination with calmness and coolness, and come to the result that the evidence in the case requires. In this case there is really very little difference in the evidence, scarcely any contrariety of testimony before you. That this woman has been killed is admitted and proved. That this prisoner was the cause of her death, that he killed her, is also proved beyond all question, and not denied. The offense, then, by the people, is *prima facie* made out; and the question arises on the part of the prisoner, what is the defense to this charge? Well, the defense has set up, so far as it may be discovered from the evidence and arguments of counsel, his insanity. Insanity, gentlemen, can never be based upon supposition, upon fancy, upon mere allegation. It must be based upon proof; it must be based upon testimony. Like every other defense known in the law, insanity must be based upon evidence.

Now, what is the evidence of this insanity? You must coolly and calmly investigate it, and determine whether it has an existence here as a defense. If it has, you must give it

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force; if it has not, you will pronounce against it. Now, the first evidence, so far as I understand, is, that this man is more than usually excitable, more than usually impulsive. I am bound to tell you as matter of law, that the mere fact of the prisoner being more than usually excitable, that he is more liable to be irritated than the generality of men, that he has a more irascible temper than men generally have, is not evidence of insanity. It certainly is not insanity. It can scarcely be evidence of insanity; it must be regarded, if at all, as evidence of the condition of a man more easily becoming insane, more liable to become insane, not however of insanity itself. What other evidence is there in the case? Why, it is alleged the act itself evinces insanity. Well, gentlemen, I hardly think it necessary to define to you what insanity is; I think you understand it. A person is not insane surely, who knows right from wrong, and who knows that the act he is committing is a violation of law, and is wrong in itself. If he is conscious that the act is wrong at the time he is committing it, that is a violation of law, that is a violation of the laws of the land; he cannot be said to be insane. If, however, at the time he commits the act he is under a delusion, he does not know right from wrong, he does not know that the act he commits is an offense, he does not know that it is wrong, but is under a delusion in regard to it, why surely he is not responsible for his acts, he is an insane man.

Now as to the facts of this case: It seems that this man Willis had been engaged to the deceased in the relation of accepted suitor. He had an apprehension while at the south that there might be some disturbance, some misfortune occurring to him, that he might not attain the end that he desired, that he might never enjoy her as his wife. It is insisted on the part of the people, that having this murder then in mind, he uttered these threats; that upon its being suggested to him, he remarked that if he did not marry her, if another man married her, the honeymoon would be short, and he would not want to live after. Well, it appears that he afterward returned to this county, remained here for some time

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and indulged in some excesses. Then he returns again south, and from there writes a letter stating that he regretted exceedingly the course of life he had adopted while at home in Ulster county. He also adds that if she was to leave him—leave him for this cause—he should not blame her, but regret it very much, and should love her still. But if she should take another, he could not blame her. That is the substance of the Alexandria letter if we may so term it. Then he comes to this county again, some time in the winter, and remains here up to the day of the tragedy. From sometime in September or October the husband of the deceased commences to pay his attentions in the character of a suitor. That goes on until April, and on the 4th of April he is married to her. The prisoner hears of his attentions some two or three weeks before the marriage. He hears of his riding out with her, and he speaks of it in a very excited manner; that it cannot be true; that it is impossible. But afterward he finds that it is true, and that he is sorry that he ascertained it. He appears a good deal excited about it. You would suppose it quite natural, if a man had any regard for a woman, that he would be excited when she abandoned him, whether giving any cause for so doing or not. The very fact that she is abandoning him, and looking in another direction and advising him to the contrary, we should naturally say was good cause for him to be excited. Then, on the 4th of April, she is married to another man. He hears of it and does not believe it. On the Tuesday preceding the catastrophe he becomes satisfied that it is true, and states to his employer, Mr. Houston, that it is true. It grieves him very much, as it is natural to suppose; he sheds tears over it a number of times. He keeps on the next day in his usual avocation, and on Thursday morning after, as he says, having had this subject in his mind, he goes forth twice with a view of committing this offense. But his courage failed, and he returned each time. On Thursday morning, the 9th of April, he goes there with the knife he borrowed of this man Cointot; he goes there with the knife in his pocket, and in the manner de-

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scribed to you by the witness, seizes this woman and cuts her throat repeatedly until she is dead.

Now, gentlemen, this is the act that is regarded as an act of insanity. I may go a little further, however. After doing that he goes out, and going to the husband of the deceased with the bloody knife, says: "You, I am a murderer." He then leaves, is pursued, and, when about to be overtaken, surrenders himself—says that he will not attempt to escape, and desires no man to pursue or arrest him. Now this is the act which is regarded and claimed as an evidence of insanity. It is not the province of the court to state that it is or is not; it is a matter for you to determine. I am not aware that there has ever been a case, which the law has held as a case of insanity, where there has not been delusion. Was there any delusion here? Did not this man know that he was going to kill this woman? Did he kill her intentionally? After it was done did he avow it? Did he express on some occasion contrition for it? At other times did he not say that he was willing to suffer for it—he had done this deed, and if he had seven lives to lose he would do it again? It was said that this was done so openly, so defiantly, that therefore it should be regarded as an act of insanity.

Well, gentlemen, that would depend again upon the temperament and character of the individual who commits the offense; it would depend somewhat upon the condition of his mind. The prisoner, it appears, said, when he was at the south, that if she married another than himself, that the honeymoon would be brief, and he would not want to live after it. It seems that he had been somewhat dissipated, and was so up to the week of this occurrence. It is for you to say whether, as it was contended by the counsel for the people, he was just in that state of mind of a man who indulged too freely—indulged too much in various ways—to commit crime; and when this anticipated marriage, which he had looked forward to with hope, came to him as a misfortune, he turned round, and, ready to avenge himself for the outrage

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committed upon his happiness, take her life, and at the same time terminate his own career.

It must be a very strange case, gentlemen, to say the least of it—a case which has never come under my observation in the books, that the act itself, when a motive accompanies it (if you believe there was a motive here for revenge), can be regarded as a case of insanity. In some cases one man commits an offense openly; another does it secretly—depending very much, of course, upon the nature and character of the man, his boldness and his recklessness, his cowardice and his meanness, and his desire to shrink from the consequences of the act. We hear of cases sometimes of a man having in confidence declared hostility against a certain individual, or even openly declared, and he arms himself, meets him and shoots him on sight. We hear of another who arms himself and waylays his enemy secretly in the woods, and shoots him behind the back, when no man sees him. But the one offense is just the same as the other in law.

Now, gentlemen, I have not deemed it important to define murder to you, which is really the killing of a human being with premeditation—with design—purposely. That this killing was purposed, was intended, is clear and undenied. It was intended to be done, and the only question is, was this man insane—insane when he did the act? I have alluded to all that I deem it important to possess you of this case, because it is in a nut-shell, so far as it regards its evidence; and it is for you to pass judgment with a just responsibility to yourselves and to the country. It is always a desirable thing for a right minded man to obtain by his conduct the good opinion of his fellow men; but it is a higher motive still, far higher, that he obtains his own good opinion—that he obtains the approbation of his own conscience in the discharge of his duty—that he so demean himself as a public officer that he secures the approbation of his own conscience.

Now, gentlemen, our duty is simply, upon this subject, to pronounce upon this issue: Is this man guilty or not guilty of this charge? Pardon is no part of our province; that belongs

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to another branch of the government. Its exercise may be pleasant and gratifying, but it is not for us to exercise. Jurors sometimes obtain an idea that they may acquit a man even though the evidence requires his conviction — that they *may* do it, and that they have done hardly anything which should be condemned. In truth, gentlemen, any officer of the law, any juror who deliberately and willfully acquits a man when the evidence pronounces him guilty, is equally guilty of a violation of duty as if he condemned the innocent. I leave this case in your hands to dispose of it as honest men, and render such verdict as the evidence requires.

The counsel for the prisoner excepted to so much of the charge of the court as held that a man is not insane who knows right from wrong, and who knows that the act he is committing is a violation of law and wrong in itself.

The jury found the prisoner guilty of murder in the first degree.

The counsel for the prisoner then moved the court to set aside the verdict for the reasons stated in the following affidavits:

ULSTER OYER AND TERMINER.

The People of the State of New York
v.
William Willis.

Ulster County, ss:

William H. Felter, of Kingston, in said county, being duly sworn, says: That he is well acquainted with *Smith H. Shaw*, one of the persons who was a juror upon the trial of the above mentioned indictment; that, during the month of November last past, the said *Shaw* had a discussion with deponent in regard to the trial of the said *Willis*, and the act of which he stood accused; that the said *Shaw* mainly contended that the said *Willis* should suffer death for the alleged offense, and, according to deponent's best recollection, said that if he (*Shaw*) was on the jury which tried him, he would certainly hang him.

WILLIAM H. FELTER.

Sworn before me, this 2d }
day of April, 1864, }

JACOB FREILEWEH, *Notary Public, U. C.*

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COURT OF OYER AND TERMINER.

The People of the State of New York
v.
William Willis.

Ulster County, ss :

Henry H. Jones and Hyman Houghtaling, of Kingston, in said county, being sworn says: That during the present week, and previous to the impanneling of a jury in the above cause, they heard Smith H. Shaw, one of the jurors who served in the above cause, express his opinion in regard to the above case; and the said Shaw gave it as his opinion that the said William Willis deserved to, and ought to suffer death for the act which he had committed.

HYMAN HOUGHTALING,
HENRY H. JONES.

Sworn before me, this 2d }
day of April, 1864, }

J. J. SNYDER, *Justice of the Peace.*

ULSTER OYER AND TERMINER.

The People
v.
William Willis.

Ulster County, ss :

Theoderic R. Westbrook, Erastus Cooke and William Willis, being sworn, say: That the first two above named were the counsel for the prisoner, on the trial of the above indictment, and that the latter is the person who was found guilty of the murder of Mrs. Phelan, that neither of deponents knew that Smith H. Shaw, the juror who is mentioned in annexed in affidavits had formed or expressed any opinion in this cause until after the said trial; that the said Shaw denied on being examined upon his challenge as a juror, that he had formed or expressed any opinion therein.

T. R. WESTBROOK,
WILLIAM WILLIS,
E. COOKE.

Sworn before me, this 2d }
day of April, 1864, }

H. W. TIBBALS, *Clerk.*

The district attorney read the following affidavits in opposition to such motion, to wit:

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Smith H. Shaw, being duly sworn, says: That he has heard read the affidavit of William H. Felter; that deponent never, neither in November last, or at any other time, said to said Felter, either in substance or form, what is alleged in said Felter's affidavit.

Deponent further says, that he had heard read the affidavits of Hyman Houghtaling and Henry H. Jones; that deponent recollects the conversation that deponent had with Houghtaling and Jones, referred to in said affidavit; that deponent did not therein express his opinion that William Willis deserved to and ought to suffer death for the act which he had committed as is alleged in said affidavit.

That deponent might have said that if he, the prisoner, was proven guilty, then he ought to be punished, but nothing more. Deponent further says that he had never, prior to the trial of William Willis, either formed or expressed in any way his opinion as to the guilt or innocence of the accused.

Sworn before me, this 2d } S. H. SHAW.
day of April, 1864, }

H. W. TIBBALS, *Clerk*.

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The People
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Henry H. Holden, being duly sworn, says: That he was the foreman of the jury on the trial of William Willis; that the jury, after retiring, individually agreed upon their verdict; that there was not the slightest difference of opinion among the jurors about the guilt of the said Willis, and that Smith H. Shaw had no influence in the deliberations of the jury, and took no part in the rendering of the verdict, except giving his assent thereto.

H. H. HOLDEN.

Sworn before me, this 2d }
day of April, 1864, }
H. W. TIBBALS.

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The court denied the said motion upon the grounds, 1st. That the Court of Oyer and Terminer had no power to grant a new trial. 2d. If it had, then upon the merits; to which decision the counsel for the prisoner excepted.

The prisoner was sentenced to be executed, and an order to stay proceedings having been obtained, a writ of error was brought, and the record removed into this court.

Several additional affidavits, which were not read before the Court of Oyer and Terminer, were also inserted in the case. These affidavits related to the question whether the juror, Shaw, had expressed an opinion before the trial. Their substance is sufficiently stated in the opinion of the court.

T. R. Westbrook and *E. Cooke*, for the prisoner.

I. The judge erred in charging the jury, "that if he is conscious that the act is wrong at the time he is committing it, that is a violation of law, *that is a violation of the laws of the land*, he cannot be said to be insane."

The error in the charge consists in stating to the jury that a person can be convicted of crime who is conscious that the act is forbidden by *human* laws; in other words, that a person who knows that "the laws of the land pronounce the act he commits to be a crime, then such person is amenable to the laws he has violated, although a diseased mind told him that the laws of God *required* him to commit the act in defiance of the human enactment."

It is evident that the rule laid down by the court would condemn as criminals a large class of insane persons who ought not to be held accountable. Take, for example, the case of a *religious* enthusiast, who *fancies* that the Supreme Being has commanded him to do a certain act. It is evident that in regard to the existence of such a command his mind is diseased, though he has reason sufficient to tell him that the "laws of the land" forbid its commission, yet if he yields, as he erroneously supposes, to the higher authority, is he an accountable being? It is respectfully submitted, upon both reason and authority, that he cannot be.

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In *Bellingham's Case*, quoted by BARCULO, J., in *People v Pine* (2 Barb. R., 570, 571), Lord MANSFIELD thus laid down the rule: "It must be proved, beyond all doubt, that at the time he committed the atrocious act with which he stood charged, he did not consider that murder was a crime against the laws of '*God and man*.'"

Judge BARCULO, in the same case, on page 571, says: "Lord LYNTHURST, in *Rex v. Offord*, put this question: Did the prisoner know that in doing the act he offended against the laws of *God and man*?"

In *Chitty's Medical Jurisprudence*, 354, the doctrine is thus stated: "In practice, to prevent the jury from being embarrassed by any technicalities respecting the import of the term insane, the substantial question presented to the jury in this and all cases, whether of alleged idiocy, lunacy or insanity, either in general or in monomania (that is, delusion confined to a particular subject), is whether, at the time the alleged criminal act was committed, the prisoner was incapable of judging between right and wrong, and did not then know he was committing an offense against '*the laws of God and of nature*.'"

II. The juror, Smith H. Shaw, having declared to William H. Felter, in November, previous to the trial, that "Willis should suffer death for the alleged offense, and that if he, Shaw, was on the jury which tried him he would certainly hang him;" and having also declared to Hyman Houghtailing, Henry H. Jones and Andrew Layman, during the week of the trial, and previous to the impaneling of a jury therein, "that the said Willis ought to and should suffer death for the killing of Mrs. Mary Phelan," the verdict should be set aside and a new trial granted.

This point presents two others, to wit: *First*, can the court now examine this question? *Second*, if it can, should a new trial be granted on account thereof? Each of these questions will be presented under distinct and separate points.

III. The Supreme Court, at general term, has power to grant a new trial for this reason:

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First. The writ of error removes the cause from the Oyer and Terminer into the Supreme Court, and the court having got possession of the case will hear the affidavits.

This was precisely the practice adopted in *Eastwood v. The People* (8 Park. Cr. R., 25). The prisoner was convicted of murder at the Monroe Oyer and Terminer. After conviction, the prisoner's counsel moved the Oyer and Terminer for a new trial on account of irregularities of the jury. The motion was denied. The case was brought into the Supreme Court by writ of error, and upon affidavits showing the irregularities of the jury, a new trial was granted. The opinion was delivered by SELDEN, J., and although no point was made upon the practice, it is conceived that if any could have been made it would not have escaped the attention of the court and counsel. The case is identical with ours, both as to the motion in the Oyer and Terminer, and the subsequent practice.

The counsel for the prisoner also understood that this court, upon the previous motion in this case, decided that the motion must be made after the return to the writ of error.

Second. But this court has also the power to grant a new trial directly upon motion, by virtue of its general supervisory power over the acts and doings of subordinate tribunals and officers.

Matter of Bradhurst v. The President and Directors of the First Great Southwestern Turnpike Road Company, reported in 16 Johns. R., page 8. This was a motion direct to the court, upon affidavits to stay the sale of certain lands upon assessments made by commissioners. It was objected that the court could not interfere by motion, but *per curiam*. "There can be no doubt of the power of the court to cause these proceedings to be brought before them. It has been frequently decided that when the legislature confer a power upon an inferior tribunal, the exercise of which may affect the rights of person or property, notwithstanding their decision may be declared to be final, yet this court, like that of the court of K. B., has a general superintending control over its proceedings. (2 Caines R., 179, 182.) Nor can there be any doubt of our

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power to grant a *certiorari*. The parties aggrieved have a right to that writ; and if asked for we could not refuse it. * * * Analogous cases have come before this court as to proceedings under the "act for relief against absconding and absent debtors;" and we have on motion afforded every relief which the case required; we have stayed the proceedings, and modified them according to the equity and justice of the case. (*In the matter of M'Kinley*, 1 *Johns. Cas.*, 187; *Learned v. Dural*, 3 *Id.*, 141, 278; *Lenox v. Howland*, 3 *Caines R.*, 257; 2 *Id.*, 318; 1 *Johns. R.*, 165, 174; 7 *Id.*, 248.) We have done this by virtue of our general superintending power over all such inferior jurisdictions, and we shall exercise that power in the present case."

See also *Lennox v. Howland* (3 *Caines R.*, 257). It was a motion to set aside proceedings on an attachment; it was objected "that the court had no jurisdiction in this summary way, as the act had chalked out the only mode of proceeding by which a supersedeas could be obtained." But the Court, per SPENCER, J., held, "that from the general superintending power of this court we have a right to examine whether the attachment has not improvidently issued, and on this ground review the order of the judge by whom it was directed."

IV. The Court having the power to grant a new trial in the mode we propose, we claim that the juror, Smith H. Shaw, having prejudged the case of the prisoner as shown by the expression used by him, the verdict should be set aside, and a new trial granted.

Declarations made by a juror showing a fixed determination to find a particular verdict, made prior to the impanneling of the jury, have uniformly been held to furnish good cause for setting aside a verdict. This has been repeatedly held in the State courts, the Federal courts, and also in England.

In *Robert Sellers v. State of Illinois* (3 *Scam. R.*, 412), it was decided: "It has always been held that if a juror prejudice a cause, and if it is unknown to the failing party in time to challenge, it is a good cause for a new trial.

On page 416, DOUGLAS, J. (the late Stephen A.), says:

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"It is wholly immaterial, for the purpose of this motion, whether the prisoner be guilty or innocent. Law, justice, humanity, forbid that he should be deprived of his life by such means, and by a jury thus constituted."

In *Flanagan v. State* (7 *Watts & Serg. R.*, 415), it was held: "The expression of an opinion by a juror in regard to the guilt or innocence of a defendant, before he is called to the bar, is a good cause for challenge, but after trial it is not a sufficient cause for granting a new trial. If a juror had prejudged a case, leaving his mind unopen to conviction, it would be good cause to set the verdict aside."

The United States v. Fries, indictment for treason, reported in 3 *Dallas R.*, 515, 517: "The facts on second ground in support of the motion for a new trial were, that Rhodes, one of the jurors, after he had been summoned as a juror, declared, at several places, at several times, and to several persons, in substance, as follows: That he was not safe at home for these people (meaning the insurgents); that they ought all to be hung—and particularly that Fries must be hung. * * * After a solemn consideration, IREDELL, J., delivered his opinion in favor of a new trial, on the second ground of objection, that one of the jurors had made declarations, as well in relation to the prisoner personally, as to the general question of the insurrection, which manifested a bias, or predetermination, that ought never to be felt by a juror."

In *Munroe v. The State of Georgia* (5 *Geo. R.*, 85), it was decided: "Whenever the objection to the juror would be good cause of challenge for favor, if discovered in time, it will be ground for a new trial, if not found out until after verdict." (See page 140, 5 *Geo. R.*)

The opinion in the case just cited was by LUMPKIN, J., and is a very elaborate one. After careful review of the cases, on page 142 he adds: "And these decisions are all right. The law requires that jurors should be *omni exceptione majores*, not liable to objection on account of malice, ill will, hatred, revenge, prejudgment or the like. If they are under any of these influ-

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ences, they are certainly improper jurors to try a citizen for life."

Again, on page 144, he says: "But for the apprehension of extending this opinion to an unreasonable length, I would notice the few other cases to be found in the books seemingly adverse to the doctrine which we propose to establish. They will be found to turn on other points, and, when rightly understood, to strengthen our position."

In the *State v. Hopkins* (1 Bay, & C., p. 373), the motion was founded upon a single affidavit, and the affiant was shown to be a man of bad character:

"The court, after hearing the arguments, were of the opinion that the matter of fact set forth in the affidavit, if true, was a good cause for a new trial, and it would be difficult to say it was not so, even if the character of the witness was of a suspicious nature. At all events, it was a doubtful point; in which case it was the duty of the court to lean on the merciful side, and give the prisoner another chance for a fair trial. New trial granted."

In *Toxdale v. The State* (9 Hum. [Tenn.] R., 411), the syllabus of the reporter is as follows: "Indictment for murder. There was a verdict of guilty, and, on motion for a new trial, two affidavits were presented. One affidavit showed that some months before the trial, Shelton, one of the jurors who tried the case, stated that from the best information he could get the defendant ought to be hung for the offense with which he was charged. The other affidavit showed that some three or four months before the trial the same juror stated that, according to his information, the defendant ought to be punished, or would be punished for the offense with which he was charged. Shelton stated in his examination that he had not formed or expressed an opinion. The court holds, upon this state of facts, that Shelton had prejudged the case, and that the defendant was entitled to a new trial."

This court will see that the court goes no further in the case cited than this court is asked to decide: First. The opinion was not a decisive one. He admits it to be founded

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only on information. Second. It was proved by only two affidavits, whilst we have four. Third. The last opinion was expressed some three or four months before trial, and is proved by only one affidavit. In our case the juror expressed his "conviction" during the week of the trial, and his expressions are proved by three affidavits.

In *Busick v. The State of Ohio* (19 *Ohio R.*, 198), the court decided: "If a juror, when interrogated, says he has formed no opinion respecting the guilt or innocence of the accused, and after verdict it appears that before the trial he had said 'if he, the prisoner, is not hung there is no use of laws,' a new trial should be granted."

In *Cody v. The State* (3 *How. [Miss.] R.*, 27), the reporter's note is: "It was held good ground for a new trial that one of the jurors, after he was summoned and before trial, declared that should he be of the jury, he did not think he could clear the accused, but would be bound to find him guilty."

This same doctrine is maintained in *Cain v. Cain* (1 *B. Munroe [Ky.] R.*, 659).

In *Vernum v. Hanwood* (1 *Gilman [Ill.] R.*, 659), the court granted a new trial, because one of the jurors had expressed an opinion, and they say: "The doctrine on this subject, as laid down in the cases of *Smith v. Eames*, *Gardener v. The People*, and *Sellers v. The People* (3 *Scam. R.*), is reaffirmed."

In *Bishop v. State* (9 *Georgia R.*, 121), it was decided: It is ground for new trial, if one of the jurors, before the trial, makes declarations which clearly indicate that he is not above all exceptions, and that his opinion is not a hypothetical one, dependent upon the whole proof, but formed exclusively in reference to the evidence which should be adduced on the part of the prosecution."

In *Presbury v. The Commonwealth* (Court of Appeals of Kentucky, 9 *Dana R.*, 203), on page 204, EWING, J., says: "If the objection goes to the moral capacity or impartiality of the juror, or to any matter which goes to impeach the fairness or impartiality of the verdict, if not discovered until after verdict, it would no doubt be as good ground for a new trial as a cause

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of challenge before. But when the objection rests upon technical ground, as the want of property, alienage, or the like, not at all affecting the moral capacity, or impartiality of the triers, or the justice of the verdict, we cannot admit that this rule applies."

The same rule also prevails in England.

In *Dent v. The Hundred of Hertford*, reported in *Salk. R.*, page 645, the case is there stated: "A new trial was granted upon affidavit, that the foreman declared the plaintiff should never have a verdict, whatever witnesses he produced."

In *Sir George Wynn v. Bishop of Bangor* (2 *Comyn R.*, 601), which was an action of ejectment, "after verdict for the plaintiff, it was moved for a new trial on several affidavits showing, * * * * * secondly, that one of the jurors declared at the view, that by what he had seen (before the shower for the defendant had shown) they should soon determine the dispute; and afterwards, upon the day before the trial, he said Sir George Wynn was a neighbor, and right or wrong he would give it for him; and for these reasons the court granted a new trial."

In *Cancemi v. The People* (16 *N. Y. R.*, 501), STRONG, J., on pages 504, 505, says: "The right secured by law to a fair and impartial jury, with minds open to receive and weigh the evidence, and balanced to the matters to be tried, is of the highest importance, and should be carefully guarded by the courts, especially in cases involving human life."

V. But it may be said that the juror (Shaw) denies that he used the expressions attributed to him. To that we answer, that little or no weight should be given to his contradiction.

In *People v. Eastman* (3 *Park. Cr. R.*, 25), SELDEN, J., on page 49, says: "In the case of *Taylor and Webb* which arose in 1858, a motion was made to set aside the verdict because some writings had been delivered to the jury by a stranger. Lord Hale, who was counsel in the case and opposed the motion, produced the affidavit of the foreman of the jury that they had not looked at the writings. But the court refused to listen to the affidavit. BOLLE, Ch. J., said: "The affidavit

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of the jury ought not to be allowed to make good their own verdict; for now they are, as it were parties, and have offended and should not be allowed by their own oath to take off their offense? (*Trials per pais*, 225; *Viner's Abr., Trial*, 458, *pl. 6.*) But, notwithstanding this early decision, it has, no doubt, been the practice of the courts to receive the affidavits of the jurors themselves in answer to a charge of irregularity or abuse. They have, however, generally been considered as an unreliable species of evidence. In *Commonwealth v. McCaul* (*supra*), WILSON, J., says: "From the mode on which collusion and tampering is generally carried on, such circumstances are generally known to no person except the one tampering and the one tampered with, or the persons between whom a conversation might be held which might influence a verdict. If you question either of these persons on the subject, he must criminate or declare himself innocent, and you lay before him an inducement not to give correct testimony."

In the case of *Hines v. The State* (8 *Humph. R.*, 597), the court says: "The only witness who gives any explanation whatever, is the offending juror. This affidavit, it is true, excludes the possibility that he was tampered with, if his testimony shall be deemed sufficient to establish the fact. But we do not think this affidavit can be relied on as proof of the innocence of his conduct."

D. M. Dewitt (District Attorney), for the People.

I. This case is in this court by virtue of the writ of error only, and not by virtue of any notice of motion. Even if additional affidavits might be read, they are read upon the argument after return to the writ, and not upon original motion. (*Eastwood v. People*, 3 *Park. Cr. R.*, 25.)

1. The claim is unheard of anywhere, that the general term have the power to set aside a conviction in the Oyer & Terminer upon *motion* made in the first instance. The statute prescribes the mode of review in criminal cases, and that is by writ of error or *certiorari*.

2. The cases cited by the counsel for the prisoner to show that

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this court can grant a new trial directly upon motion, are not in the least degree analogous to the case now before the court.

They are cases where the court interfered to regulate special proceedings under a special statute. There is no pretense that this court could set aside a verdict of a jury even in a civil case, upon motion made to it in the first instance; much less in a criminal case.

II. The affidavits printed in the appendix to the error book, cannot be considered by this court.

They form no part of the return to the writ of error; they were used upon a motion to this court, which was denied because of want of jurisdiction to entertain it, and were filed with the clerk of this court. The motion to set aside the verdict made in the Court of Oyer and Terminer, was heard on affidavits which now appear in the bill of exceptions; that court decided the motion upon those affidavits; to that decision the prisoner's counsel excepted; and even if this court have the power to review that decision, they should review it as made upon the affidavits read in the court below, and not upon additional affidavits, which the Oyer and Terminer never heard.

If such were the practice, no conviction for a capital crime could stand.

1. In the case of *Eastwood v. The People* (8 Park. Cr. R., 25), relied on by the counsel for the prisoner, there was no objection made to the reading of affidavits upon the argument, nor was it objected that the decision of the Oyer and Terminer could not be reviewed on writ of error. (*Vide note, p. 27.*)

It also appears that the irregularities complained of were conceded by the counsel for the people, both in the motion to the Oyer and Terminer and in the court above, and that the only issue was whether or not those irregularities constituted sufficient cause for granting a new trial.

This probably is the reason why no objection was made to the reading of the affidavits.

And this case is in direct conflict with decisions both prior

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and subsequent, and was expressly referred to in the opinion of HOGEBROOM, J, in the case of *Hartung v. The People* (4 *Park. Cr. R.*, 331), as of no authority, because no objection was made to the reading of the affidavits.

2. Even before the adoption of the Revised Statutes, it was never pretended that affidavits might be read showing irregularities which did not appear upon the record.

The practice, then, was to allege diminution, and pray for a *certiorari*. (*Pelletreau v. Jackson*, 7 *Wend.*, 478; *Lambert v. The People*, 7 *Cow. R.*, 103.) Such, it would seem, is the practice at the present time. (*McGuire v. The People*, 2 *Park. Cr. R.*, 148; *Cancemi v. The People*, 18 *N. Y. R.*, 133.)

But a *certiorari* would bring up nothing but the affidavits used in the court below, and its decision upon them. How, then, can other affidavits be addressed to this court?

III. The exception to the charge of the justice is frivolous on its face.

IV. "At common law, the only mode of redress for errors occurring on criminal trials was by motion for a new trial in the court where the trial was had, unless the error was in some matter which formed part of the record when it might be reviewed after judgment by writ of error. Bills of exception, by which questions of law, made and decided on such trials, may be brought up and reviewed in a higher court, were unknown to the common law, although now allowed by a statute of this State. But the statute is limited to exceptions taken on the trial of the main issue, and does not reach such as are made on the trial of a preliminary or collateral question.

"The words are: 'On the trial of any indictment, exceptions to any decision of the court may be made by the defendant in the same cases and manner provided by law in civil cases.'" (*Freeman v. People*, 4 *Denio R.*, 21; 2 *R. S.*, 736, §21.)

1. The same doctrine was held in the following cases: *People v. Haines* (11 *Wend. R.*, 561); *People v. Dalton*, 15 *Wend. R.*, 583; *Wynehamer v. People* (2 *Park. Cr. R.*, 332).

2. This court, at general term in this district, in two several cases, has expressly adjudged this question against the pris-

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oner. (*People v. McCann*, 3 *Park. Cr. R.*, 272; *Hartung v. People*, 4 *Park. Cr. R.*, 319, 329, 332, 342, *op.*; also in *People v. McMahon*, 2 *Park. Cr. R.*, 668.)

3. These authorities show not only that the exception is unavailable, but that the affidavits and the decision of the motion should be stricken from the bill of exceptions and entirely disregarded. No formal motion for this purpose is necessary.

V. If the preceding views are erroneous, the Court of Oyer and Terminer having denied the motion upon the *merits*, this court should not disturb its decision.

The opposing affidavits fully meet every accusation in the moving papers.

1. The power of the Court of Oyer and Terminer to entertain the motion has never been doubted. (*Wharton's Am. Cr. Law*, § 3061, *note 1*; *Rex v. Fowler*, 4 *B. & Ald. R.*, 278; *People v. Hartung*, 8 *Abb. Pr. R.*, 182; *People v. Wilson*, *Id.*, 187; *People v. Carnal*, 1 *Park. Cr. R.*, 256.)

In the case of *Quimbo Appo*, the Court of Appeals simply decided that the Court of Oyer and Terminer has no power to grant a new trial upon the merits after a conviction for felony. (*Quimbo Appo v. People*, 20 *N. Y. R.*, 581, 558.)

2. It is eminently proper that the power to grant new trials in criminal cases on the ground of irregularities occurring at the trial, should reside exclusively with the court in which the trial is had, and that its decisions should be final. No justice will deny a motion for a new trial where there have occurred irregularities so flagrant as to work manifest injury to the prisoner. The whole facts are before him, the good faith of the motion, the accused juror, as in this case, the possibility or impossibility of injury to the prisoner, the credibility of the persons making the charges—all these are immediately within view of the court, and render it abundantly competent to decide the question.

Should such decision be subject to review and reversal in this court, there is no capital conviction but what may be shaken by affidavits made by parties unknown to the court

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and the prosecuting attorney, and gathered together by a felon under sentence of death, as the last effort of his despair.

Should the justice in the court below be guilty of palpable injustice to the prisoner in denying such a motion, the prisoner has an ample remedy in the invocation of the pardoning power.

The cases cited by counsel under his fourth point, are cases where the motion was made to the court where the trial was had.

2. This is no case where this court would be justified in overriding the practice in order to grant relief to an injured man. No crime could be more clearly proven; and the fact that no injury has been done the prisoner, is not less clearly apparent.

VI. The decision of the Court of Oyer and Terminer, denying the motion for a new trial, was just and right.

1. The affidavit of Felter, read on the motion, is not positive, but to the "best of deponent's recollection," and speaks of a casual conversation which took place, as he alleges, six months before. It is positively denied by Shaw's own affidavit.

2. The conversation related in the affidavit of Houghtaling and Jones is sufficiently explained by the affidavit of Shaw. An opinion expressed based upon the hypothesis that the prisoner be proven guilty, is no ground even for challenge.

3. It should be borne in mind that it was universally known and admitted that Willis killed Mrs. Phelan; that the only defense proposed to be set up was that of the temporary insanity of the prisoner; and that in these alleged conversations the question of insanity was not discussed, but simply the fact of the homicide.

A preadjudication, by a juror, of the guilt of the accused of the deliberate killing of the deceased, when that fact is admitted and the whole case hinges upon the question of insanity, upon which the juror never had an opinion, would certainly form no ground for setting aside a verdict.

VII. Admitting the truth of the accusations brought against

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the juror, still there is no sufficient cause for setting aside the verdict.

1. There is no case in this State where a verdict has been set aside on that ground. The present is not such a case as would warrant the court in establishing a precedent for so doing. The juror, according to the minutes of the reporter, was not asked whether he had ever formed or expressed an opinion.

Even if the juror had, in an unguarded moment, in the heat of discussion, made use of the expression attributed to him, yet if at the time he was sworn his mind was unbiassed and open to conviction, he was a competent juror, and his former indiscreet avowal could work no injury to the prisoner.

2. There is no pretense that there was any malice against the accused, or any deliberate intention to injure him, in the breast of the juror. The justice who presided at the trial had ample evidence of this, in his appearance and demeanor. Should the court conclude to consider the affidavits in the appendix, the want of malice is made still more plainly apparent.

And yet if there were no malice or intention to injure, then the juror, when he took his seat, must have sincerely believed himself unprejudiced, or in his own words, "did not think" what he had heard "had inclined his belief in the matter."

A reference to the opinion in the case of *Flannagan v. State* (7 *Watts & Serg. R.*, p. 415), cited by the counsel, will show how careful that court was in dealing with motions of this kind.

3. It would be a dangerous practice to establish, that in any capital conviction, no matter how clearly the crime may be proven, the prisoner has only to procure one or two affidavits accusing one of the jurors, to secure at least a new trial and a postponement of his awful punishment.

Preadjudication is a charge very easily made, very difficult of refutation. The setting aside of verdicts in capital cases on such ground, unless it amount to flagrant injustice, malice be plainly apparent, and the fact be conclusively established, strikes at the very foundation of the jury system.

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By the court, INGALLS, J. Two questions are presented for consideration. One arises upon the charge of Justice PECKHAM, and the portion excepted to is as follows: "That a man is not insane who knows right from wrong; who knows the act he is committing is a violation of law and wrong in itself." In giving effect to that branch of the charge, it is proper to consider other portions which accompanied it. The learned justice charged the jury as follows: "A person is not insane, surely, who knows right from wrong, and who knows that the act he is committing is a violation of law and is wrong in itself. If he is conscious that the act is wrong at the time he is committing it, that is a violation of law; that is a violation of the law of the land; he cannot be said to be insane. If, however, at the time he commits the act, he is under a delusion, he does not know right from wrong; he does not know that the act he commits is an offense; he does not know it was wrong; but is under a delusion in regard to it; why, surely, he is not responsible for his acts, he is an insane man." I fail to discover wherein the charge in that respect is not quite favorable enough to the prisoner. The test furnished by the charge, and by which the jury were to be governed in determining whether or not the prisoner was insane, was strictly in accordance with the law. (*The People v. Pine*, 2 Barb. R., 566.) Justice BARGULO, at page 572, says: "A simple and sound rule may be thus expressed. A man is not responsible for an act when, by reason of voluntary insanity or delusion, he is, at the time, incapable of perceiving that the act is either wrong or unlawful." In the same opinion, reference is made to the rule as laid down by Chief Justice SHAW, of Massachusetts, as follows; "A man is not to be excused from responsibility, if he had capacity and reason sufficient to enable him to distinguish *between right and wrong* as to the particular act he is then doing. A knowledge and consciousness that the act he is doing is wrong and criminal, will subject him to punishment." (*Freeman v. The People*, 4 Denio R., 28.) BEARDSLEY, J., says: When insanity is interposed as a defense to an indictment for an alleged crime, the inquiry is always brought down

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to the single question, of a capacity to *distinguish between right and wrong when the act was done*. The mode of putting the question to the jury on these occasions has generally been, whether the accused, at the time of doing the act, *knew the difference between right and wrong*; which mode, though rarely, if ever, leading to any mistake with the jury, is not deemed so accurate when put generally and in the abstract, as when put with reference to the party's knowledge of right and wrong in respect to the very act with which he is charged." (2 *Greenl. Ev.*, § 372.) "The rule of law is understood to be this, that a man is not to be excused from responsibility, if he has capacity and reason sufficient to enable him to *distinguish between right and wrong as to the particular act he is then doing*." (See also *Dean's Med. Jurisp.*, 549, 550, 551; *Beck's Med. Jurisp.*, 588.) No error was committed in the charge; it is fully sustained by the authorities cited; and the exception thereto, not being well taken, must fail.

The remaining question to be considered is, whether Smith H. Shaw was a competent juror? On the part of the prisoner, it is insisted that he had formed and expressed an opinion unfavorable to the prisoner previous to the trial, which rendered him incompetent to serve, and which fact did not come to the knowledge of the prisoner or his counsel previous to the verdict. It is insisted, on the part of the people, that that question cannot now be raised upon affidavits and considered by this court. The practice has not been uniform as to the manner in which such alleged irregularities are to be brought before this court for review. The Oyer and Terminer properly decided that they had not the power, in such cases, to entertain the motion and grant a new trial. (*Quimbo Appo v. The People*, 20 *N. Y. R.*, 331.)

Where there has been a conviction, and sentence is suspended in order to take the opinion of the court at general term, the proceedings are removed to this court by writ of *certiorari*. (2 *Rev. Stat.*, 736; *Hill v. The People*, 10 *N. Y. R.*, 463; *The People v. Townsend*, 1 *Johns. Cas.*, 104; *The People v. White*, 22 *Wend. R.*, 167; *Colt v. The People*, 1 *Park. Cr.*

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R., 612; *The People v. Hulse*, 3 *Hill R.*, 310.) In the last case there was a bill of exceptions. (*The People v. Shorter*, 4 *Barb. R.*, 460; *The People v. McKay*, 18 *Johns. R.*, 212.)

Where there is a conviction and judgment, the proceedings can only be removed into this court by writ of error, and when the irregularity complained of is of such a nature that it cannot be properly embraced in the return to the writ of error, but the same has become part of the proceedings, a writ of *certiorari* may also issue to bring up such proceedings, involving the alleged irregularity. (*Rev. Stat.*, 2d ed., vol. 2, p. 599, § 45; *Cancemi v. The People*, 18 *N. Y. R.*, 133; *Stephens v. The People*, 19 *Id.*, 551; *McGuire v. The People*, 2 *Park. Cr. R.*, 148.) But where the irregularity complained of has not been introduced into the record or proceedings, so as to constitute it a proper subject to be returned to the writ of error or *certiorari*, I think affidavits may be read upon the argument after the writ of error has been returned, but not before, as this court acquires no jurisdiction of the matter, so as to entertain a motion for a new trial until such return. (*Eastwood v. The People*, 3 *Park. Cr. R.*, 25, note, p. 27; *The People v. Hartung*, 8 *Abb. Pr. R.*, 132; *The People v. Wilson*, *Id.*, 137.)

The case of *Hartung v. The People* (4 *Park. Cr. R.*, 319) is cited by the district attorney. That case decides that such alleged irregularities are not the subject of review on exception or writ of error, and such is undoubtedly the law; but it does not necessarily follow that this court may not entertain a motion upon affidavits to correct an error arising out of an irregularity prejudicial to the rights of a prisoner, and when he has no other legal mode of redress.

It is true, the learned justice who delivered the prevailing opinion, questions the expediency of considering such questions at general term, but finally allowed the matter objected to to remain. Since the decision of the last cited case, the case of *Quimbo Appo v. The People* (20 *N. Y. R.*, 531) has been decided, in which I understand the Court of Appeals to decide that a Court of Oyer and Terminer has not the power to grant a new trial. SELDEN, J., at page 552, refers to the

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practice which had been pursued in the Supreme Court where questions of irregularity had been brought into that court for review. No motion has been made to suppress any of the matter contained in the printed case. I conclude that this court may, upon the affidavits, consider this question of alleged irregularity.

A conviction will not be set aside and a new trial granted, where it is apparent that no injury has resulted to the prisoner from the irregularity complained of. Neither justice nor a proper exercise of humanity, even in a capital case, demands such a determination.

The People v. Ransom (7 Wend R., 414), SUTHERLAND, J., says: "The conclusion from these cases appears to me to be this: That any mere informality or mistake of an officer in drawing a jury, or any irregularity or misconduct in the jurors themselves, will not be sufficient ground for setting aside a verdict, either in a *criminal* or civil case, where the court are satisfied that the party complaining has not or could not have sustained any injury from it." (See, also, *The People v. Hartung*, 17 How. Pr. R., 85; *The People v. Carnal*, 1 Park. Cr. R., 256; *Taylor v. Everett*, 2 How. Pr. R., 23; *Baker v. Simmons*, 29 Barb. R., 198.)

On behalf of the prisoner, the affidavit of William H. Felter is produced, in which he states that in the month of November, 1863, Shaw (the juror), in a conversation with him, "warmly contended that the said Willis should suffer death for the alleged offense, and if he (Shaw) was on the jury which tried him, he would certainly hang him." This affidavit purports to have been taken April 23, 1864.

The printed case contains another affidavit of said Felter, which purports to have been taken on the 2d day of April, 1864, in which he states as follows: "That the said Shaw *mainly contended* that said Willis should suffer death for the alleged offense; and, *according to deponent's best recollection*, said that if he (Shaw) was on the jury which tried him, he would certainly hang him." It will be observed that in this affidavit Felter qualifies his statement, and does not undertake

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to speak with certainty; but in the affidavit which was made at a later period, he undertakes to speak without qualification, and without accounting for his improved memory. The joint affidavit of Henry H. Jones and Hyman Houghtaling is also produced, in which they state as follows: "That the said Shaw, in the course of the conversation, *gave it as his opinion* that the said Willis ought to and should suffer death for the killing of Mrs. Mary Phelan, for which he then stood indicted for murder; that said Shaw did not qualify his opinion by saying that if he (Willis) was found guilty he ought to suffer death, or be punished, but he expressed himself clearly and positively that the said Willis was guilty, and should suffer death for the act." This affidavit purports to have been taken on the 2d day of April, 1864.

In the other joint affidavit of Jones and Houghtaling, contained in the printed book, and which purports to have been taken on the said 2d day of April, 1864, they state as follows: "That said Shaw gave it *as his opinion* that said William Willis deserves to and ought to suffer death for the act which he had committed." In neither affidavit do they undertake to give the language used by Shaw, but merely state that *he gave it as his opinion*, leaving it for the court to adopt the conclusion of the witnesses as to the substance of such opinion.

The affidavit of Andrew Layman is also produced, in which he states that he was present at the conversation referred to in the affidavit of Jones and Houghtaling, and states further as follows: "That the statement therein of the conversation of the said Jones and Houghtaling is in all respects correct; that deponent well remembers that the said Smith H. Shaw did not in any way qualify his opinion, but expressed his clear and *decided conviction* that said Willis was guilty, and deserved to and should suffer death." In this affidavit, Layman merely adopts the statement of Jones and Houghtaling, and does not undertake to give the language used by Shaw, but merely his conclusion deduced therefrom. This criticism upon the affidavits seems justified, as Shaw expressly denies having made any such statement, or having expressed any

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such opinion as is attributed to him in these affidavits. The affidavit of Smith H. Shaw (the juror) is produced, in which he expressly denies having the conversation with Felter to which he refers, or any conversation with him in relation to Willis. In regard to the statements contained in the affidavits of Jones, Houghtaling and Layman, he states that he was in the shoe shop, and heard Jones and Houghtaling discussing the case of Willis, and that they continued such discussion nearly all the time he was in there; that Jones asked him (Shaw) if he was going to attend the trial; to which he replied, that he thought he should. He further states as follows: "That he does not recollect of saying anything whatever in relation to Willis while in the shop; deponent might have said that if the prisoner was guilty, he ought to be punished, or something to that effect, *but deponent is positive that he never while in the shop, or at any other place or time, give it as his opinion that Willis ought to suffer death, or was guilty of the crime with which he was charged.* He further states: "Deponent further says that he, deponent, never at any time, or in the presence or hearing of any person, prior to his being sworn, formed or expressed an opinion in regard to the guilt or innocence of the said William Willis. That when he entered the jury box he was entirely free from any bias or prejudice against the prisoner, and was prepared to render, and did render a verdict according to the evidence, independent of anything he had heard or read before, in regard to the homicide." It appears from the affidavit, that the relations between Shaw and the prisoner were of the most friendly character. Shaw was in the habit of visiting the prisoner after his confinement, loaned him the use of tools, and purchased leather for the prisoner, to enable him to manufacture harness, to raise money to defray the expenses of his defense; and further, directed his men to do certain work upon the harness, which the prisoner could not do in the jail, and for all of which he made no charge. The affidavit of DeWitt C. Davis supports a portion of the affidavit of Shaw. If inferences were to be indulged, based upon the relations

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which existed between Shaw and the prisoner, they certainly would be that Shaw inclined favorably rather than prejudicially toward the prisoner.

The affidavit of John Lyon is also produced, in which he states that he had been in the employment of Shaw for the period of two years, and boarded in his family, and was almost constantly with him during the day; that he had heard him speak in a friendly manner of Willis, but had not heard Shaw express any opinion as to the guilt or innocence of the prisoner prior to his acting as a juror; that on one occasion the son of Shaw remarked that Willis ought to be hung; that his father reprimanded him, and told him every man was presumed innocent until he was found guilty, and that he ought to wait and hear the result of the trial before he made such assertions. The affidavit of George H. Shaw (the son) is also produced, in which he concurs in the statement contained in the affidavit of Lyon. There is also the affidavit of Richard Voorhees, who states that he worked in the shop with Shaw, and by his side, and boarded in his family; that he never heard Shaw express any opinion as to the guilt or innocence of Willis, or say that he ought to be hung, or anything to that effect.

The affidavit of Henry H. Holden contains the following statement: "That he was foreman of the jury on the trial of William Willis; that the jury, after retiring, individually agreed upon their verdict; that there was not the slightest difference of opinion among the jurors about the guilt of Willis; that Smith H. Shaw had no influence in the deliberations of the jury, and took no part in the rendering of the verdict, except giving his assent thereto."

From a careful examination and consideration of all the facts upon which this alleged irregularity depends, I have come to the conclusion that the case of the prisoner was not in the slightest degree prejudiced by any opinion formed or expressed by the juror Shaw; and that he was in all respects a competent juror. During the examination of this case, I fully appreciate the consideration pressed upon the court, that the life of the prisoner is involved in the determination, and have

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pursued the investigation, actuated by a conscientious desire to arrive at a just and proper conclusion. And while indulging a proper degree of sympathy for the prisoner, and watchfulness of his rights, have endeavored not to lose sight of the other consideration, that the administration of public justice demands of the court a firm and faithful execution of the law. The judgment of the Oyer and Terminer must be affirmed, and the record and proceedings remitted to that tribunal with directions to enforce the judgment by this court.

Judgment affirmed.¹

SUPREME COURT. Broome General Term, February, 1864.
Parker, Mason, Balcom and Campbell, Justices.

PHILIP GANO v. NATHAN G. HALL.

A warrant of commitment, issued by a justice of the peace under part IV, chap. 2, title 1, sec. 5 of the Revised Statutes, is valid without a seal.

When a justice of the peace, after an examination, has adjudicated that a person brought before him shall give sureties to keep the peace, and the prisoner has refused to do so, it is his duty to issue his warrant of commitment; and such warrant issued on the next day will be valid, though, in the meantime, the prisoner has been suffered to go at large by the consent of the justice.

Form of a warrant of commitment on a refusal to give sureties to keep the peace.

THIS was an action for false imprisonment, tried at the Otsego circuit, before Mr. Justice BALCOM, in December, 1862.

The defendant justified the arrest and imprisonment under a warrant of commitment issued by the defendant as a justice of the peace.

On the trial, it appeared that on the 11th September, 1861,

¹ NOTE. — This judgment was affirmed by the Court of Appeals, at June term, 1865.

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a complaint, in writing, was made by Harvey E. Saxton, before the defendant, as a justice of the peace, against the plaintiff, by which complaint it appeared that the plaintiff had threatened to shoot Saxton; the complaint concluded with a prayer that the plaintiff might be bound by recognizance to answer at the next Court of Sessions, and in the meantime to keep the peace. The complaint and examination were taken upon oath, and upon them the defendant issued a warrant, under which the plaintiff was brought before the defendant, as such justice of the peace. The plaintiff appeared with counsel. The defendant decided that plaintiff should give bail in the sum of \$300, which the plaintiff refused to give. The defendant said he was unwell and could not make out the warrant that night, and that the plaintiff could go pretty much where he had a mind to that night. The next morning the defendant made out the commitment, which was as follows:

Otsego County ss:

To any constable of said county, Greeting:—Whereas, Harvey E. Saxton, on the 11th day of September, instant, made complaint to me, in writing, on oath, that Philip Gano, on the 11th day of September, instant, at the town of Middlefield, in said county, threatened to shoot him, the said Harvey E. Saxton, and otherwise injure him; whereas, it appeared to me, upon the examination of the said complainant, duly made on oath, and reduced to writing, and subscribed by him, that there was just reason to fear the commission of said offense by said Philip Gano, and he having been brought before me, on my warrant, was required to enter into a recognizance in the sum of three hundred dollars, with sufficient surety, to appear at the next Court of Sessions, to be held in said county, and not to depart the same without leave, and, in the meantime, to keep the peace towards the people of this State, and particularly towards the said complainant; and the said Philip Gano having refused to find such security, you are therefore commanded, in the name of the People of the State of New York, forthwith to convey him to the common jail of said county, and deliver him to the keeper thereof, who is hereby

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required to receive the said Philip Gano into his custody, and him safely keep in the said jail until he shall find such security or be discharged by due course of law.

Witness my hand, this 12th day }
of September, 1861, }

NATHAN G. HALL, *Justice of the Peace.*

The warrant of commitment was not under seal.

The plaintiff was arrested under this warrant and imprisoned for a short time in the jail of Otsego county, when he was discharged on *habeas corpus*.

The evidence being closed, the court proceeded to charge the jury as to the rules of law by which they should be governed in determining whether their verdict should be for the plaintiff or for the defendant. The court, among other things, charged the jury that the warrant of commitment was good without seal, to which plaintiff's counsel excepted. The court also charged the jury that it was a question of fact for them to determine whether the defendant, Hall, discharged the plaintiff, Gano, at the time he was brought before him on the warrant of arrest, to which the plaintiff's counsel also excepted; that if defendant did discharge him, he was liable in his action for subsequently issuing the mittimus on which the plaintiff was arrested and imprisoned, but if he did not discharge him, and issued the mittimus without previously discharging the plaintiff, the plaintiff could not recover. Plaintiff's counsel excepted.

The counsel for the plaintiff then requested the court to charge the jury:

1. That the process of commitment is void, for the reason that it was issued without seal, and the defendant is therefore liable. The court refused so to do, and the plaintiff's counsel excepted.

2. That when the justice, Hall, told the plaintiff he could go pretty much where he pleased until Hall got the mittimus made out, it was a discharge in law. The court refused so to charge, and the plaintiff's counsel excepted.

3. That unless the magistrate had some means after the

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prisoner's leaving to compel his attendance, the prisoner, when he went away, was in law discharged. The court refused so to charge, and the plaintiff's counsel excepted.

4. That leaving the prisoner without the control of any person, the magistrate had no power to procure his attendance, and in non-attending the party would be guilty of no contempt under such circumstances. The court refused so to charge, and the plaintiff's counsel excepted.

5. That what did occur before the magistrate on the night of the arrest before him was in law a discharge. The court refused so to charge, and the plaintiff's counsel excepted.

The jury returned a verdict for the defendant, and the plaintiff moved for a new trial.

J. A. Lyles, for the plaintiff.

I. The warrant of commitment in this case was not under seal.

The common law requires all warrants in criminal proceedings to be under the hand and seal of the magistrate who issues them; and a warrant not under seal is void, unless our statute has authorized it to be issued without seal. (*The People v. Holcomb* (3 *Park. Cr. R.*, 656, and cases cited; 1 *Chitty's Cr. L.*, 109; 2 *Hall R.*, 122; *Magistrate's Cr. L.*, *Barb. R.*, 494; 2 *Hawk. Pl. of the Cr.*, ch. 16, § 13; *N. Y. Civil and Cr. Justice*, 579; *Davies' Justice*, 106.)

There is no provision in the statute allowing a warrant of commitment to issue without seal.

II. The defendant discharged the plaintiff when he told him "he could go pretty much where he had a mind to that night," and allowed him to go home without putting him in charge of any person.

The plaintiff was in the custody of the court after he had been arrested on the warrant and brought into court, and the justice should have committed him for safe keeping, or left him in the custody of the officer who arrested him, and who was in the house at the time, as required by the statute. (3 *R. S.*, 5th ed., 1003, § 5.)

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But instead of doing that, the justice released the prisoner from the care and custody of the officer, and allowed him to go free, without any restraint and without any means of compelling his return to or appearance in court. And we submit that the same rule would apply to a justice, under such circumstances, as to a constable or sheriff having a prisoner in charge.

And if either of the last mentioned officers had even allowed a prisoner to go home, to say nothing of a positive direction on the part of the officer to the prisoner "to go where he had a mind to that night," it would have been a voluntary escape or rather release and discharge on the part of the officer, and the prisoner could not have been retaken.

A voluntary escape is where the prisoner goes outside the jail limits by permission of the sheriff or his deputy, even for the shortest time. (*Crocker on Sheriffs*, 250.)

In case of a voluntary escape, the prisoner cannot be retaken, and if the officer does retake him, he is liable for false imprisonment. (*Jansen v. Hilton*, 10 *Johns. R.*, 549; *Tillman v. Lansing*, 4 *Id.*, 45; *Thompson v. Lockwood*, 15 *Id.*, 256; *Littlefield v. Brown*, 1 *Wend. R.*, 398; *Graham's Pr.*, 148.)

III. The justice erred in submitting the question to the jury, whether the defendant, Hall, discharged the plaintiff, Gano, at the time he was brought before him on the warrant of arrest.

There was no question of fact for the jury to decide. There was really no conflict of evidence on the point of what was said and done by the defendant at the time the plaintiff was under arrest.

The court should have decided, as matter of law, whether the defendant, Hall, discharged the plaintiff on the night of his arrest. There being no dispute about the facts, it was purely a question of law. (*Bulkeley v. Keteltas*, 2 *Seld. R.*, 384; *Besson v. Southard*, 6 *Id.*, 236.)

IV. The judge erred in refusing to charge the jury as requested.

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Crippen & Brooks, for defendant.

I. The charge of Judge BALCOM to the jury that the warrant of commitment was good without seal was correct: .

1. It is made the duty of the justice on a proper complaint to issue his warrant with or without seal. (3 *R. S.*, 5th ed., 991, § 3.)

Section 5 provides for the commitment of the prisoner on a warrant till he shall find sureties to keep the peace.

Revised Statutes, 5th ed., 454, § 158, provides that all process issued by any justice shall be signed by him, and may be under seal or without seal.

Warrants issued under the statute "for the prevention of crimes," are not criminal process.

In *Bradstreet v. Furgison* (17 *Wend. R.*, 185), Judge NELSON says that "they are separate and distinct from those prescribed in cases where crimes are actually committed," and should not be confounded with them. (*Affirmed in Court of Errors*, 23 *Wend. R.*, 638; *People v. Holcomb*, 3 *Park. Cr. R.*, 664.)

The court says, warrants issued under the statute, entitled "of proceedings to prevent the commission of crimes," may be with or without seal.

Benac v. The People (4 *Barb. R.*, 32) is a case directly in point. The form of the warrant of commitment is set out in the case, and is without seal. Benac was committed under the act respecting disorderly persons for want of sureties for good behavior. The court held the warrant good. Surety for good behavior is of near affinity to surety for the peace; but the former includes the latter kind of surety and something more, for he that is bound to good behavior is therein also bound to keep the peace.

2. The justice drew the warrant from the form given in the *New York Civil and Criminal Justice*, page 648. This is a late work, published for the guidance of justices of the peace, and the form is without seal.

In *Benedict's Treatise on Justices' Courts*, page 420, the form of the warrant to commit under this statute is given without

seal. This is likewise a standard work, and has passed through several editions.

In the *New Clerk's Assistant*, page 860, the form is given without seal.

If this court should hold a seal necessary to the validity of the commitment, it would reverse the practice in justices' courts, and in nearly every case under the statute subject the officer to a bill of costs for doing his duty, as prescribed by all the standard works written for the guidance of justices of the peace.

II. The court did not err in submitting the question to the jury, whether the justice discharged the plaintiff on the night of his arrest, and in refusing to charge as the plaintiff's counsel requested.

None of the parties present understood that the justice intended to discharge the plaintiff from custody. The defendant and his witnesses testify that the justice refused to discharge the plaintiff, and told him he should hold him to bail; that it was two or three o'clock in the morning; that the justice was sick and tired, and that he could not make out the warrant that night, and that plaintiff could go pretty much where he had a mind to that night, and that plaintiff's counsel said that would be well enough; that plaintiff and defendant both went home, and that the defendant made out the mittimus at 8 o'clock the next morning.

What injury has the plaintiff suffered by not being incarcerated in jail that night?

Had the plaintiff been dragged to Cooperstown, a distance of six miles, at 8 o'clock at night, he would have complained, and justly, of cruelty on the part of the magistrate, and would have urged that he had committed no crime for which he should have been hurried off to jail.

Judge BALCOM, in his charge to the jury, said that when the constable brought the plaintiff before the magistrate and made his return on the warrant, that the prisoner was in the custody of the law and under the control of the court.

Lord HALE has laid down the rule "that the prisoner may

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be continued in the custody of the officer, or may be detained in the justice's house, or committed to some near safe place of custody, till the examination can be taken by the magistrate." (*Barb. Crim. Treatise*, 482; 2 *Hale R.*, 120.)

It is also well settled that after the magistrate has determined on committing the party he may verbally authorize the constable to detain him until he can make out his mittimus. (1 *Chit. Cr. L.* 74; 7 *East R.*, 533; 3 *Smith R.*, 513; *Barb. Cr. Tr.*, 480.)

If he had a right to place him verbally in charge of a constable, he had a right to detain him in his own custody till he could make out his warrant, and it is an erroneous proposition that after the justice had permitted the prisoner to go home he could not again retake him.

In *Barb. Cr. L.* (p. 36), it is said, "an officer who has negligently suffered a prisoner to escape may retake him whenever he finds him." "As the public good requires that criminals should be brought to justice, a jailer who has voluntarily suffered a criminal to escape can retake him."

If Gano had run away he could have been punished for an escape.

"An escape from the custody of the law is an offense of itself, though no force or violence is used, because all persons are bound to submit themselves to the judgment of the law." (*Barb. Cr. L.*, 36.)

He was in custody of the law when brought before the magistrate, and he had a right to permit him to go till he could make out the proper warrant. And the law is satisfied and the prisoner not injured if permitted to go to his own house to spend the night, especially where the prisoner had been guilty of no crime.

It is an every day practice for public officers to permit prisoners to go at large where there is no probability of their escape.

2. The prisoner's counsel consented that the plaintiff should go until the mittimus should be made out, and the plaintiff should not be allowed to set up that he has been injured by

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what was done for his accommodation and with his approval and consent.

III. The defendant was a public officer and was acting officially. He has drawn his papers according to the most approved forms laid down in our books. He allowed the prisoner to go to his own house that night, by his counsel's consent, a kindness at which the plaintiff ought not to complain.

By the court, MASON, J. The judge, at circuit, was clearly right in holding the warrant of commitment good without seal. As to the first warrant issued for the arrest of the offender, under this statute, it is expressly provided that it may be with or without seal. (3 R. S., 991, § 3.)

The fifth section, which provides for the warrant of commitment, is silent as to the subject of a seal. The general statute, therefore, covers the case, which provides that "*all process issued by any justice of the peace shall be signed by him, and may be under seal or without seal.*" (3 R. S., 454, § 158.)

I cannot assent to the view expressed by one of the judges of this court, that this section only applies to civil process. The language is too broad and general to receive such a limited construction. It declares that all process issued by a justice of the peace shall be signed by him, and may be under seal or without seal. If a warrant of commitment is a process, issued by a justice of the peace, then this statute embraces it. No one can pretend that such warrant is not a process issued by a justice of the peace. I find, in looking through the various provisions of the statutes in regard to criminal warrants, and those which are *quasi* criminal, none of them are required to be issued under seal. There are two instances, and two only, where it is expressly said they may be with or without seal, and in all other cases the statute is silent. They are, therefore, left to be controlled by this general statute, which applies to all and every process issued by a justice of the peace. This view corresponds with all the treatises and books of forms which have been issued by the profession as guides

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for those courts; and such a warrant was certainly approved in *Benac v. The People* (4 Barb. R., 32). There is nothing in the point made by the plaintiff, that here was an escape of the prisoner of an entirely voluntary character, and that the justice, therefore, acted without jurisdiction in issuing his warrant of commitment in the manner he did in this case. The plaintiff had been brought before him on a proper warrant, and the justice had done more than was required of him. He had allowed a full examination into the matter, and had adjudicated that the plaintiff should enter into sureties to keep the peace; and the defendant declared that he would not. And the only duty remaining for the justice was to issue his warrant of commitment. This was a mere ministerial act, according to all the cases, and did not require the presence of the prisoner to give validity to the warrant. This process, and all the proceedings under this statute for the prevention of crime, are *quasi* criminal in their character, and fall under the rule applicable to criminal proceedings. The rule in regard to escapes in criminal proceedings, and even under criminal process, is entirely different from what it is in civil. After an escape from an arrest under criminal process, the officer is bound to retake the prisoner, and whether the escape be voluntary or otherwise makes no difference. (6 Hill R., 344-349.) It is preposterous to say that the justice had no jurisdiction to issue this warrant, even if he voluntarily allowed the escape.

The judge, at circuit, would have been fully justified in peremptorily directing a verdict for the defendant. He, however, allowed the case to go to the jury upon the question of the escape, and, as they found there was no escape, their finding should not be disturbed. A new trial can do the plaintiff no good, and is therefore denied.

New trial denied.

SUPREME COURT. Onondaga General Term, December, 1864.
Allen, Mullin, Morgan and Bacon, Justices.

THE PEOPLE v. THOMAS WALTERS *et al.*

The defendants having pleaded not guilty to a defective indictment for murder, the court refused to quash it upon their motion.

The court will not ordinarily quash an indictment after the defendants have been arraigned and pleaded not guilty.

In cases of indictments which charge the higher crimes, or other offenses which effect the public at large, as perjury, forgery, &c., the courts uniformly refuse to quash, except where the objection could not be obviated or the error corrected by a new indictment. Per MORGAN, J.

The court is in no case bound to quash an indictment *ex debito justitiae*, but may oblige the defendant to plead or demur. It is to be presumed, in the first instance, that every person has a *christian* as well as a *surname*, and an indictment for murder is defective which describes the deceased as "one Hardy," without other designation, and without an averment by way of excuse, that his name is otherwise to the jurors unknown. Per MORGAN, J.

THE defendants were indicted for the murder of "*one Hardy*," who was not otherwise named or described in the indictment. They were arraigned before the Court of Oyer and Terminer, of Oswego county, in May, 1864, and pleaded not guilty. The indictment was then removed by *certiorari* into this court. A motion was then made in behalf of the prisoners to quash the indictment.

A. Perry, for the prisoners.

Wm. H. Baker (District Attorney), for the people.

By the court, MORGAN, J. Good pleading undoubtedly requires that the deceased should be described by his christian and surname. If, however, the name is unknown, he should be described as a person whose christian name is unknown, with such other circumstances as will point, with common certainty, to the person intended. (1 *Arch.*; 80; 4 *Comyn Digest*, 661, under letter "G.") But common certainty is enough, and if the description is sufficient to inform the prisoner who is intended, the indictment may be supported.

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(1 *Chitty Cr. L.*, 303, 304; *Comyn Digest*, *supra.*) "When the name of the injured party cannot be ascertained, the indictment is sufficient for assaulting an unknown. So for robbing, though the ignorance results from the injured party refusing to disclose his name. So for murdering. But proof that the name was known will entitle to an acquittal. The description of third persons that will suffice, is such as whereby they may be distinguished from all others." (*Comyn Digest*, *supra*, p. 669, note "r.")

We are informed by the district attorney that the deceased was a negro man, and was only known by the name of "Hardy." If it was proper to act upon this information, it does not perhaps follow that the deceased was without a christian name. The defect is apparent upon the face of the indictment, for it is to be presumed, in the first instance, that every person has a christian name. The fact that it is unknown should have been stated in the indictment. It is not like the case of a misnomer, for, in such a case, the prisoner is required to plead the misnomer, and give his true name. If the name of the injured party is really known, the allegation that his christian name is unknown would be improper. The prisoner would be discharged from such indictment, and tried upon a new one rectifying the mistake. (*Arch. Cr. L.*, 81, note 1, and cases there cited.)

It has, however, been held that a person may be described by the name by which he is usually known. Thus it has been adjudged that an indictment for an assault on John, parish priest of D., is sufficiently certain. (*Id.*, 81, 82, citing 2 *Hawk. R.*, ch. 25, § 72; 2 *Leach R.*, 248; *Russ. & Ry. C. C.*, 510.) In the case of *The State v. Farr* (12 *Rich. S. C. R.*, 24), the indictment charged the defendant with unlawfully buying corn "from a certain slave of Joseph Glover, named Cuffy," and it was held to be a sufficient description of the person intended. In the case of slaves, therefore, the legal presumption that they have both christian and surnames, does not seem to obtain. In *Gardner v. The State* (4 *Ind. R.*, 632), the indictment described the defendant as "one A. G. Gardner, late of

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said county" of Decatur. The prisoner was found guilty of a misdemeanor. The objection that the defendant was not sufficiently described, was taken on the trial and overruled. On error, the Supreme Court held the objection fatal, and reversed the judgment.

It is unnecessary to say how far such an objection would be available, under our statute, after verdict. The cases, however, show that when the defendant has a christian name, it must be set forth if it is known. And the authorities are quite uniform, that if the defendant has no christian name, or if it is unknown, that fact should be averred in the indictment; and then it is somewhat doubtful whether the description would be sufficient without some further description to show who was intended. Perhaps it would be sufficient to designate him as "a certain negro man by the name of Hardy, whose name was otherwise to the jurors unknown." If that is the only name by which he is known, it would not be the case of a variance or false description to be taken advantage of on the trial. And I think it quite doubtful whether the court would not be bound, after verdict, to overlook the defect in the pleading, for the indictment is strictly true so far as it goes; and the further allegation of circumstances, to show the identity of the deceased, or to excuse a further description of him, would not, perhaps, be regarded as of such a substantive character as to prejudice the defendant within the meaning of the statute. (*3 R. S., 5th ed., 1020, § 54, sub. 4.*) The indictment is now objectionable, because of the uncertainty as to who is intended by the name of Hardy. It is to be presumed, in the absence of contrary allegations, that he has a christian as well as a surname. But what becomes of this presumption when the trial shall have disclosed the fact that he had no other name? Would the court reverse the conviction upon the theory that the deceased had a christian name, if it appeared on the trial that he had none? But we have now no knowledge, either by affidavit upon this motion or by suitable allegations in the indictment, that Hardy is without a christian name. I should, therefore, be in favor of

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quashing the indictment if the prisoners had not pleaded to it, and the case was one of minor importance. After the indictment was quashed, a new and more regular one may be preferred against them. (*Chitty on Cr. L.*, 804.) For whenever one escapes by means of an insufficient indictment, as his life was not in jeopardy, he is liable to be again indicted. (*Reg. v. Brumidge*, 8 P. W. R., 480.)

But it is ordinarily too late to move to quash an indictment after the accused has been arraigned and pleaded not guilty. The time when the court will entertain such a motion, however, rests in some degree in the exercise of a sound discretion. (NELSON, J., in *The People v. Monroe Oyer and Terminer*, 20 Wend. R., 109.) When the motion is made on the part of the defendant, the rules by which the court are guided are more strict, and their objections are more numerous, because, if the indictment be quashed, the recognizers will become ineffectual. (1 *Chit. Cr. L.*, 800.) And without regard to the time of making the motion, the courts usually refuse to quash on the application of the defendant, when the indictment is for a serious offense, unless upon the clearest and plainest ground; but will drive the party to a demurrer, or a motion in arrest of judgment, or a writ of error. (*Id.*)

It is, therefore, a general rule, that no indictments which charge the higher offenses, as treason or felony, or those crimes which affect the public at large, as perjury, forgery, &c., will be thus summarily set aside. (*Id.*; *Barb. Cr. L.* 349.)

The prisoners, therefore, are not entitled, as of right, to prevail upon this motion, however defective the indictment may be. At common law, it is said, the judges may, *in discretion*, quash any indictment for any insufficiency in the body or caption of it, as will make a judgment given on it against the defendant erroneous; but they are in no case bound so to do *ex debito justicie*, but may oblige the defendant to plead or demur. (*Bacon Ab.*, 382, *Indictment K.*) And this (says the author) they generally do when the offense is of an enormous or public nature, or when the indictment has been removed by *certiorari* and a recognizance for procuring the trial of it has

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been forfeited. In *Rex v. Johnson and five others* (1 Wil. R., 325), the court say: It is in the discretion of the court whether they will quash any indictment whatever upon motion. And in *The King v. Wyn* (2 East R., 226), the court refused to quash a defective indictment, for an aggravated misdemeanor, on motion of the prosecutor after plea pleaded, in order to give him time, if so advised, to prefer another. And see the case of *Rex v. The Inhabitants of Belton* (1 Salk. R., 272), where the court say, "we never quash indictments for forgery, perjury or subornation, or any crimes concerning the highways. So of all crimes that are heinous."

Chitty says (1 *Chit. Cr. L.*, 304), that the defendant can gain in general very little advantage, except delay, by such application.

We may, therefore, refuse this motion upon two grounds: First, it is too late, after plea pleaded, to entertain the motion according to the ordinary practice of the courts. Secondly, the indictment is for a heinous offense, and the defect may be corrected by a new indictment, in which case the court uniformly deny the application, especially when the effect will be to discharge the recognizances of any one given for the defendant's appearance, or, if they are in prison, to liberate them.

It is for the district attorney to decide whether he will prefer a more regular indictment against the defendants before putting them upon trial, or whether he will try them upon this indictment, and leave the defendants to move in arrest or to bring error. By our statute a second indictment would, upon motion, supersede the present indictment. (2 *R. S.*, 726, § 42; 20 *Wend. R.*, 108.)

I am of opinion, therefore, that the motion to quash ought not to be granted in this case, until a more regular indictment is found and presented. If the district attorney fails to indict again, and the prisoners are convicted on this indictment, the same question may come up for review upon motion in arrest, or upon a writ of error. It is unnecessary to say now what would be our opinion as to the validity of the objection after conviction.

Motion denied.

SUPREME COURT. Broome General Term, January, 1865.
Parker, Mason and Balcom, Justices.

THE PEOPLE, plaintiffs in error, *v.* JAMES W. CYPHERS,
 defendant in error.

Where a grand jury was drawn and summoned, and attended and acted as such, at a term of a Court of Sessions appointed by the county judge, to be held at the same time as a county court, the proceedings were held to be valid, although the county judge had omitted to designate in his order that a grand jury was required to attend at that term; and a plea in abatement, setting up such omission as an objection to the validity of an indictment, was, on demurrer, overruled.

When the justices, elected to act as justices of the Sessions, fail to appear at the time appointed for the commencement of a term of a Court of Sessions, the county judge has power to designate two other justices of the peace to act as justices of the Sessions, instead of adjourning over the court until the next day.

Form of a writ of error in behalf of the People, with an order that the prisoner be retained in custody, indictment for murder, with special pleas in abatement and demurrer thereto.

THIS case comes before the court on a writ of error sued out in behalf of the People. The writ of error, with the allowance thereof, and the order to retain the prisoner in custody, were as follows:

The People of the State of New York, by the Grace of God
 [L. S.] *Free and Independent, to the Court of Oyer and Terminer*
in and for the county of Otsego:

Because, in the record and proceedings, and also in the giving of judgment on a certain indictment, which was in our said Court of Oyer and Terminer, before you, against James W. Cyphers, for the crime of murder, manifest error hath intervened, to the great injury of the said People of the State of New York, as by our district attorney we are informed; we being willing that the error, if any there be, should be corrected, and full and speedy justice done in the premises between us and the said James W. Cyphers, in this behalf, do command you that if judgment be thereupon given, then you send to our justices of our Supreme Court for the

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sixth judicial district, distinctly and openly under your seal, the records and proceedings upon the indictment aforesaid, with all things concerning the same and this writ, so that they may have them at the court house in the village of Binghamton, on the 4th Tuesday of January next, that the records and proceedings aforesaid being inspected, we may cause to be further done thereupon for correcting that error, what of right, and according to the law and custom of the State of New York ought to be done.

Witness, WM. W. CAMPBELL, one of the justices of our said court, at Cooperstown, this 12th day of December, A. D. 1864.

D. A. AVERY, *Clerk*.

J. A. LYNES, *District Attorney*.

[INDORSED.]

I do hereby allow the within writ of error, and do further order and expressly direct that the said writ of error and this allowance thereof, do operate as a stay of proceedings on the judgment upon which such writ of error is brought; and the sheriff of the county of Otsego is therefore hereby ordered to retain and hold the prisoner, James W. Cyphers, in his custody until the further order of the Supreme Court on this writ of error. Dated, December 12, 1864.

WM. W. CAMPBELL, *Justice Supreme Court*.

Filed, December 12, 1864.

By return to the writ of error, it appeared that an indictment for murder had been found against the prisoner as follows:

State of New York, Otsego County, ss:

At a Court of Sessions, held at the court house, in the village of Cooperstown, in said county of Otsego, the 10th day of February, in the year of our Lord, one thousand eight hundred and sixty-four, before E. E. Ferrey, county judge of Otsego county, and Charles H. Williamson and Perry P. Rogers, Esquires, justices of the peace of the county of Otsego, duly designated as members of the Courts of Sessions of said county, all justices assigned to keep the peace in and

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for said county, and also to hear and determine divers felonies, trespasses and misdemeanors in said county committed.

The jurors of the People of the State of New York, in and for the body of the county of Otsego, being then and there sworn and charged upon their oaths, present that James W. Cyphers, late of the town of Maryland, county of Otsego, and State of New York, laborer, not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil, on the 27th day of January, in the year one thousand eight hundred and sixty-four, with force of arms, at the town of Maryland, in the county of Otsego aforesaid, in and upon one Patrick Callahan, in the peace of God, and of the said People of the State of New York, then and there being, then and there feloniously, willfully, and of malice aforethought, did make an assault; and that he, the said James W. Cyphers, then and there, with both his hands, the said Patrick Callahan, in and upon the head, neck and breast of him, the said Patrick Callahan, feloniously and willfully, and of his malice aforethought, did strike and beat; and that the said James W. Cyphers, then and there, with both his hands and feet, the said Patrick Callahan so, and upon the floor, feloniously, willfully, and of his malice aforethought, did knock, cast and throw; and the said Patrick Callahan so on the floor lying and being, he, the said James W. Cyphers, with both his hands, knees and feet in and upon the head, neck, breast, stomach, back and sides of him, the said Patrick Callahan, did then and there feloniously, willfully, and of his malice aforethought, knock, cast and throw; and the said Patrick Callahan so on the floor lying and being, he, the said James W. Cyphers, with both his hands, knees and feet, in and upon the head, neck, breast and stomach, back and sides of him, the said Patrick Callahan, did then and there feloniously, willfully, and of his malice aforethought, strike, beat, stamp, kick, press, and by the said striking, beating, stamping, kicking, pressing, giving to the said Patrick Callahan several mortal wounds and bruises in and upon the breast and stomach of the said Patrick Callahan, of which said several mortal

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wounds and bruises, he, the said Patrick Callahan, from about 9 o'clock in the evening of the 27th day of January, 1864, until about nine o'clock in the morning of the 28th day of January, 1864, did languish, and languishing did live. On which said 28th day of January, 1864, the said Patrick Callahan, at the town of Maryland, in the county aforesaid, of the several mortal wounds and bruises aforesaid, died.

And so the jurors aforesaid, upon their oaths aforesaid, do say that the said James W. Cyphers, on the day and year aforesaid, in manner and form aforesaid, the said Patrick Callahan feloniously, willfully, and of his malice aforethought, did kill and murder, contrary to the form of the statute in such case made and provided, and against the peace of the People of the State of New York and their dignity.

(There were three other counts in the indictment.)

J. A. LYNES, *District Attorney.*

The indictment was sent to the Otsego Oyer and Terminer for trial, when the record showed the following entries and pleadings :

And afterwards, to wit, on the 23d day of June, 1864, and in and during the next term of the said Court of Oyer and Terminer, before RANSOM BALCOM, one of the justices of the Supreme Court, presiding justice, E. E. Ferrey, county judge of Otsego county, and Perry P. Rogers and Charles H. Williamson, justices of the peace of said county, duly designated as members of the Court of Sessions, before the justices aforesaid, at the court house aforesaid, came the said James W. Cyphers in his own proper person, and being brought to the bar here in his own proper person, and arraigned upon the aforesaid indictment, and hearing the said indictment read, and being asked whether he demanded a trial upon the said indictment, answered that he did require and demand a trial thereon, and says that he is not guilty thereof, and, therefore, for good or ill is put upon the country.

And James A. Lynes, Esq., district attorney in and for the said county of Otsego, who prosecutes on behalf of the People of the State of New York, in their behalf, doth the like.

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And thereupon the said indictment is continued in the said court before the justices thereof, until the 9th day of December, 1864, and thereupon at a term of the said Court of Oyer and Terminer held at the court house in Cooperstown, in and for the county of Otsego, before WM. W. CAMPBELL, one of the justices of the Supreme Court, presiding justice of the said Court of Oyer and Terminer, Elijah E. Ferrey, county judge of the county of Otsego, Perry P. Rogers and Miner Spicer, justices of Sessions and duly designated as members of the said court, comes the said James W. Cyphers, in his own proper person, and by his counsel, Louis L. Bundy and Hezekiah Sturges, and the said James A. Lynes, district attorney, likewise comes.

And thereupon, and before a jury had been sworn, the said James W. Cyphers by his said counsel, asked and obtained leave of the court to withdraw his aforesaid plea of not guilty, and to plead in abatement.

And the following pleas were then interposed by the said James W. Cyphers :

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James W. Cyphers.	

And the said James W. Cyphers, in his own proper person, comes into court here, and having heard the said indictment read, says: That the said court here ought not to take cognizance of the said alleged murder and felony in the said indictment above specified, because, protesting that he is not guilty of the same; nevertheless the said James W. Cyphers says, that the said indictment was not found or presented by any grand jury duly impaneled, charged and sworn at the said term of the Court of Sessions at which the said indictment purports to have been found and presented, because no order of the county judge of the said county of Otsego, was, or had been made, filed, or published, designating the said February term of the said Court of Sessions as one of the terms at which a grand jury should be required to attend, and no order

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designating or appointing a Court of Sessions for the said month of February, 1864, otherwise than by an order, of which the following is a copy :

"Terms of County Court and Court of Sessions — State of New York, Otsego County: It is ordered that the terms of the County Court and Court of Sessions, in and for the county of Otsego, be held at the court house in the village of Cooperstown, for the years 1864 and 1865, at the following times, to wit:

"A County Court and Court of Sessions on the second Monday of February, and the first Monday of August in each year. A term of the County Court on the third Tuesday in May, and the fourth Tuesday in November in each year.

"E. M. HARRIS,

"County Judge of Otsego County.

"Dated December 28, 1863."

And this he, the said James W. Cyphers, is ready to verify.

Wherefore, he prays judgment, if the said court, now here, will, or ought to take cognizance of the indictment aforesaid, and that by the court here, the same may be quashed, and the said James W. Cyphers dismissed and discharged therefrom.

And for a further plea in this behalf, by leave of the court first had and obtained, the said defendant, James W. Cyphers, says: That the said instrument, purporting to be a bill of indictment, was not found by any grand jury, duly impaneled, charged and sworn to inquire for the People of the State of New York, and for the body of the county of Otsego, because he says that no order was made by the county judge of the said county of Otsego, designating, appointing, or requiring a grand jury to be drawn or summoned to attend a Court of Sessions, appointed by the said county judge, to be held in and for the said county of Otsego, on the second Monday, 8th day of February, 1864, and that an order, of which the following is a copy, was the only order made by the said county judge appointing or designating a Court of Sessions, to be held in and for the said county, at the time aforesaid, that is to say :

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(Here the order of the county judge was again set forth as above.)

And which said order was made by the said county judge and signed by him on the 28th day of December, 1864, and in and by which order no grand jury was designated, required or appointed to be drawn, or summoned to attend the said February term of the Court of Sessions.

And this the said James W. Cyphers is ready to verify.

Wherefore, because the said alleged bill of indictment was not found by any grand jury duly impaneled, charged and sworn to inquire for the People of the State of New York, and for the body of the county of Otsego, the said defendant prays judgment of the said bill of indictment, and that the same may be quashed, and the said defendant may, by the court here, be dismissed and discharged.

And for a further plea in this behalf, by leave of the court first had and obtained, the said defendant says: That the said instrument, purporting to be a bill of indictment, was not found at any term of the Court of Sessions legally held in and for the county of Otsego, because, he says, that on the 28th day of December, 1863, the then county judge of the said county of Otsego made an order appointing a Court of Sessions to be held in and for the county of Otsego, in and for the years 1864 and 1865, of which order the following is a copy, that is to say:

(Then the order of the county judge was again set forth as above.)

And the said defendant further says: That no other, further or different order than the above was made by the said county judge, appointing or designating the time or times of holding the said Courts of Sessions in and for the years 1864 and 1865, or for the holding of a Court of Sessions in the said year 1864; and that the said second Monday of February, in the year 1864, occurred on the 8th day of the said month.

And this defendant further says: That on the said second Monday of February, and eighth day of said month, the time designated in the aforesaid order for the holding of said Court

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of Sessions, a sufficient number of persons authorized to hold a Court of Sessions did not attend at the court house, in Cooperstown, in said county, for that purpose, before five o'clock in the afternoon of that day, but that one of the persons authorized to form a part of the said Court of Sessions, to wit, E. E. Ferrey, county judge of said county of Otsego, did attend at the time and place aforesaid, to wit, on the 8th day of February aforesaid, at ten o'clock in the forenoon of that day, and Perry P. Rogers and Charles P. Williamson, justices of the peace of said county of Otsego, duly elected and designated as members of the said Court of Sessions, at a general election duly held in and for the county of Otsego, in the month of November, in the year 1863, did not, nor did either of them, attend the said Court of Sessions at the time and place aforesaid; and the said county judge did then and there, in the absence of the said two justices of the Sessions, proceed to and did designate two other justices of the peace, not members of the said Court of Sessions, to wit, Hiram Kinne, Esq., and Ezra W. Bushnell, Esq., to act with him, the said county judge, to constitute and form a Court of Sessions, and did then and there, together with the said two justices designated by him, open the said Court of Sessions, and then and there, to wit, on the said 8th day of February aforesaid, at ten o'clock in the forenoon of that day, did adjourn the said Court of Sessions until the 10th day of February aforesaid, at ten o'clock in the forenoon, at the court house aforesaid.

And the said defendant further says: That at the time and place last aforesaid, to wit, the 10th day of February, at ten o'clock in the forenoon, the said Court of Sessions convened at the place aforesaid, and the said grand jury, by which the said bill of indictment purports to be found, was then and there impaneled, charged and sworn for the first time, at or during the said February term of the said Court of Sessions.

And this the said defendant is ready to verify.

Wherefore, because the said alleged bill of indictment was never found at any Court of Sessions legally had or consti-

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tuted, or by any grand jury duly and legally impaneled, charged and sworn to inquire for the People of the State of New York, and for the body of the county of Otsego, the said defendant prays judgment of the said bill of indictment, and that the same may be quashed, and the said defendant dismissed and discharged therefrom.

And for a further plea in this behalf, by leave of the court first had and obtained, the said defendant says: That the said alleged bill of indictment was never presented to any court of competent criminal jurisdiction, or to any Court of Sessions legally organized and held, nor by any grand jury duly impaneled, charged and sworn to inquire for the People of the State of New York, and for the body of the county of Otsego, because he says that a Court of Sessions was appointed to be held in and for the county of Otsego, at the court house in Coopers-town in said county, on the 8th day of February, in the year 1864, by an order theretofore made, filed and published, in accordance with the statute in such case made and provided, by the county judge of said county, and at the time and place aforesaid, the county judge of the said county and two justices of the peace, then and there designated by him, to wit, Hiram Kinne and E. W. Bushnell, Esqrs., pretended to and did then and there assume to organize a Court of Sessions in and for said county, by the usual proclamation, and did then and there adjourn, or assume to adjourn, the said Court of Sessions, until the 10th day of February aforesaid, at ten o'clock in the forenoon, at the court house in said county, at which last mentioned time and place the Court of Sessions described in the caption to the said alleged bill of indictment, convened and organized, and the said grand jury, by whom the said alleged bill of indictment was presented to the said court, was then and there impaneled, charged and sworn, and at no other time or place and before no other court.

And the said defendant further says: That Perry P. Rogers and Charles H. Williamson, Esqrs., two justices of the peace of the county of Otsego, had, prior to the said 8th day of February aforesaid, been duly and legally elected and designated

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as members of the Court of Sessions in and for the county for and during the year 1864. And this the said defendant is ready to verify.

Wherefore, because the said alleged bill of indictment was not presented by any grand jury duly and legally impaneled, charged and sworn to inquire for the People of the State of New York, or for the body of the county of Otsego, nor to any Court of Sessions duly and legally organized and held, the said defendant prays judgment of the said bill of indictment, and that the same may be quashed.

JAMES W. CYPHERS.

Otsego County, ss:

James W. Cyphers, the above named defendant, being sworn, says that the foregoing pleas are true in substance and matter of fact.

JAMES W. CYPHERS.

Sworn before me this 10th day }
of December, 1864, }

D. A. AVERY, *Clerk of Otsego county.*

And afterwards, to wit, on the same day, and before the justices aforesaid, the defendant, James W. Cyphers, admitted and conceded the following facts:

That the 9th day of February, 1864, was the day on which the annual town meetings in and for the county of Otsego were to be held by law, and that they were so held.

That a grand jury had been drawn in the usual form, and summoned by the sheriff at the usual time, and that said grand jury appeared on Wednesday, the 10th day of February, 1864, and were charged and sworn, and did act as a grand jury, and presented the indictment in question.

And thereupon the said James A. Lynes, district attorney as aforesaid, interposed a demurrer to the pleas of the defendant, the said James W. Cyphers, of which the following is a copy:

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v.
James W. Cyphers. }

And James A. Lynes, district attorney of Otsego county, who prosecutes for the People of the State of New York in

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this behalf, as to the said plea of the said James W. Cyphers, by him above pleaded, says: That the same, and the matters therein contained, in manner and form as the same are above pleaded and set forth, are not sufficient in law to bar or preclude the said People from prosecuting the said indictment against him, the said James W. Cyphers, and that the said People are not bound, by the law of the land, to answer the same; and this he, the said James A. Lynes, who prosecutes as aforesaid, is ready to verify.

Wherefore, for want of a sufficient plea in this behalf, he, the said James A. Lynes, for the said People, prays judgment, and that the said James W. Cyphers may be convicted of the premises in the said indictment specified.

JAS. A. LYNES, *Dist. Atty.*

And thereupon the defendant, the said James W. Cyphers, joined in said demurrer, and the same was then and there argued before the justices aforesaid, by the said Louis L. Bundy and Hezekiah Sturges for the said James W. Cyphers, and by the district attorney aforesaid, for the said People.

Whereupon all and singular the premises being seen, and by the same justices being fully understood, it is considered by the said justices that the demurrer to the first and second pleas of the defendant, the said James W. Cyphers, be overruled, and the pleas sustained, and the indictment be quashed, and the prisoner discharged.

That the demurrer to the third and fourth pleas be sustained and the pleas overruled.

L. I. Burditt, for the People.

I. The county clerk is by law required to draw the names of twenty-four persons to attend every term of the Court of Sessions, which is not by the county judge designated as term, at which no grand jury is required to attend. (3 R. S., 5th ed., page 1013, § 10; *Id.*, 490, § 32.)

The sheriff is also required to summon the jurors so drawn. (3 R. S., page 490, §§ 12-25; see also 3 R. S., page 306, § 31; *Id.*, 490, § 31; *Id.*, 301, §§ 1, 2.)

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By a careful reading of the above statutes it will be seen that the county judge did not comply with the requirements thereof, in not designating any of the terms for which a jury should be required to attend. Neither did he designate any of the terms as being terms for which no jury should be required to attend.

Therefore, it being the duty of the clerk to draw, and of the sheriff to summon, a grand jury to attend the appointed terms of said Court of Sessions not thus designated, it would seem that the jury was properly and legally impaneled.

II. No challenge or objection to the array of the grand jury can now be taken. (*The People v. Robinson*, 2 *Park. Cr. R.*, 309; 8 *R. S.*, page 1016, §§ 27, 28.

III. The county judge is authorized and empowered, in the absence of the justices of the Sessions, or either of them, to fill the vacancy on the bench by the appointment or designation of justices of the peace. (*Laws of 1847*, chap. 280, 470, §§ 35, 40.)

The county judge alone can open and hold a Court of Sessions for certain purposes. (8 *R. S.*, page 1042, § 49.)

At the adjourned day when the grand jury was impaneled, charged and sworn, the justices of the Sessions were upon the bench, and also when the indictment was presented.

Neither of the objections taken can be sustained.

The prisoner has not in any manner been prejudiced.

The pleas should be overruled, and the demurrer and indictment sustained.

L. L. Bundy, for the prisoner.

I. There was no authority for the summoning or drawing a grand jury at the February Sessions, for the reason that the county judge did not, in the order appointing the courts, order or require a grand jury to be summoned.

The Constitution provides that the "county judge, with two justices of the peace, to be designated according to law, may hold Courts of Sessions." (*Art. 6, § 14, vol. 1, Statutes at Large*, p. 53.)

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1. By the judiciary act of 1847 it is provided: "And where, in any county, a grand jury shall not by law be required to attend every term of the Court of Sessions, the county judge shall direct which terms of such courts a grand jury shall attend, by an order to be made and published," &c. (4 *Statutes at Large*, 585, § 26.)

If the statute stood as above no grand jury could legally be summoned for a Court of Sessions, only on the order of the county judge, for the reason that neither the Constitution nor any statute then in force required the attendance of a grand jury at a Court of Sessions.

2. But this question would seem to be put at rest by a subsequent statute, which provides that "Courts of Sessions should be held in the respective counties at such times as the county judge shall, by order, designate, and the county judge shall, in such order, designate at which terms of the Sessions a grand or petit jury, or both, or neither, shall be required to attend, and no jury shall be required to be drawn, &c., to attend any term, &c., which shall be designated, &c., to be held without such jury." (5 *Statutes at Large*, 245, § 1.)

In the *People v. Wilcox* (23 *How. Pr. R.*, 297), it was held that an order of the county judge appointing terms of the "County Court" did not embrace a "Court of Sessions," although it is provided "that Courts of Sessions shall be held at the time and place at which County Courts for the trial of issues of fact by a jury shall be held." (4 *Statutes at Large*, 587, § 42.)

And in *People v. Moneghan* (1 *Park. Cr. R.*, 577), Judge STRONG says: "Nor since that act (*Stat. of 1851*) can a Court of Sessions be held at any other times, except in pursuance of a previous order of the county judge, made in conformity" with the act, &c., and if such a court cannot be held only in conformity with such an order, it follows that no jury can legally attend only in pursuance of the same authority.

Whether the act of 1847 is repealed by that of 1851 is left undecided in both the preceding cases.

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Nor is it material, for the purposes of the present question, whether it is repealed or not.

If the foregoing positions are correct, then it follows that this is not merely a question of irregularity in summoning a jury, but it is a question of power in the officers to draw the jury, and affects the jurisdiction of the court in the premises.

3. A Court of Sessions being one of special and limited jurisdiction, its authority must be strictly pursued. (*People v. Koeber*, 7 *Hill R.*, 39; *Cornell v. Barnes, Id.*, 35; *People v. Powers*, 2 *Seld. R.*, 50, 51; 6 *Wend. R.*, 438; 9 *Id.*, 237.)

4. It does not follow at all that a grand jury must or need attend a Court of Sessions. (See statute before referred to.)

And the statute defining the powers of a Court of Sessions specifies at least eight different acts to be performed by such court, that do not require the presence of a grand jury, or even a petit jury. (2 *Statutes at Large*, 217, § 5, *sub. 3 to 10*; 4 *Id.*, 568, § 44.)

II. The adjournment of the court on the 8th day of February to the 10th, was *coram non judice*, and void.

1. It is provided by statute, "that if a sufficient number of persons do not appear by 5 o'clock, authorized to hold a court, the one appearing, or if none appear, the sheriff or clerk shall adjourn to the next day, and if none appear by 5 o'clock that day, court shall be adjourned without day." (2 *Stat. at Large*, 218, §§ 8, 9.)

Under a statute similar to the above, when the Oyer and Terminer was first opened on Wednesday, the Supreme Court held their proceedings *coram non judice*, and void. (*People v. Bradwell*, 2 *Cow. R.*, 445; 1 *Laws of 1823*, 210, § 8; 2 *R. S.*, 2d ed., 203, §§ 19, 20; p. 202, § 12.)

2. Nor is the foregoing provision weakened, but much strengthened by the provision of the statute, giving Courts of Sessions the same power to adjourn as Courts of Oyer and Terminer. (5 *Stat. at Large*, 250, § 2.)

In reference to Courts of Oyer and Terminer, it is provided that they "may be adjourned to be held at a future day, by an entry to be made in the minutes of the court," and jurors

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may be summoned for such adjourned court, &c. (5 *Stat. at Large*, 7, § 24), and by § 25, same page, "every appointment so made," shall be published in Albany three weeks, &c. (*Sess. Laws* 1851, ch. 479.)

It is entirely clear, that under either of the foregoing provisions of the statutes, this attempted adjournment is without authority and void.

III. It only remains to examine whether this adjournment can be sustained under the Session Laws of 1847. It is provided that "whenever, at the time appointed for the commencement of any term of Oyer, &c., or at any term of the Court of Sessions, or at any time during such term, if either of the said justices shall not attend, the county judge may, at such term, designate some other justice to supply the vacancy until the justice not attending shall attend; but such designation shall not authorize the justice designated, to supply the vacancy at any other term. (4 *Stat. at Large*, p. 567, § 40; p. 587, § 35.)

This statute does not authorize the adjournment in this case, for several reasons.

1. It has no reference to organizing for the purpose of an adjournment, but only to enable the court to go on with the business of the term.

2. It does not repeal or affect, or attempt to the general provisions before cited, in reference to adjournment.

3. It only contemplates a case where one of the justices is absent, and nowhere authorizes the judge to appoint two justices to supply a vacancy caused by the absence of both of the "justices designated." The singular number, "justice," is used all through it.

This view is strengthened by the statute authorizing the judge to "designate some other justice," where one is disqualified on a particular trial. (5 *Stat. at Large*, 250, § 2.)

There is no statute that authorizes a judge of Oyer or County Court to designate more than one justice. The pleas should all be sustained, and the defendant discharged.

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By the court, BALCOM, J. The county clerk is required to draw a grand jury for any term of the County Court, in any county, "at which a Sessions may be held by law." (3 R. S., 5th ed., 1013, § 10.) The sheriff must summon the persons so drawn for such a grand jury. (*Id.*, 1014, § 12.)

The question in this case is, was the defendant in error indicted at a Court of Sessions held by authority of law?

The order appointing Courts of Sessions in Otsego county, for the year in which the indictment was found, is as follows: "Terms of County Court and Court of Sessions. State of New York, Otsego county: It is ordered that the terms of the County Court and Courts of Sessions, in and for the county of Otsego, be held at the court house, in the village of Cooperstown, for the years 1864 and 1865, at the following times, to wit: A County Court and Court of Sessions on the second Monday of February and the first Monday in August, in each year. A term of the County Court on the third Tuesday in May and the fourth Tuesday in November, in each year. Dated December, 28, 1863. E. M. HARRIS, county judge of Otsego county."

The indictment was found at the February term of the Court of Sessions, in 1864, held on the day designated in the order of the county judge for a term of the County Court and Court of Sessions. But the county judge did not designate in his order that a grand jury was required to attend at that term; and it is claimed by the counsel for the defendant in error that, by reason of this omission, a grand jury was not legally drawn or summoned for such term; and that the defendant in error was, therefore, irregularly and unlawfully indicted at that term.

According to chapter 444 of the Laws of 1851 (*Laws of 1851, p. 825*), "Courts of Sessions, except in the city and county of New York, shall be held in the respective counties, at such times as the county judge of the county shall by order designate."

The county judge having, by order, designated the time and place for holding the Court of Sessions, at which the indict-

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ment in question was found, that term of such court was held by authority of law, and hence, a grand jury was legally drawn and summoned therefor, unless the omission of the judge to designate in his order that a grand jury was required to attend at that term, made the attendance of such a jury, at such term, unlawful or irregular.

The statute is, that "the county judge shall, in such order, designate at which terms of the Sessions a grand or petit jury, or both, or neither shall be required to attend; and no grand or petit jury shall be required to be drawn or summoned to attend any term of the Court of Sessions, which shall be designated by the county judge to be held, without such jury." (*Laws of 1851, p. 825, chap. 444.*)

I think this statute is so far directory that an omission by the county judge to make the specified designations, respecting juries, does not render his appointment of the times and places for holding Courts of Sessions, without such designations, irregular or invalid. It is only when the order designates a term at which no grand jury is required to attend, that it is unlawful or irregular to draw or summon one for such term. But, if there be no such designation, a grand jury may be drawn and summoned under the statutes I have cited from the third volume of the 5th edition of the Revised Statutes, pages 1013 and 1014, for each term of the Court of Sessions, specified in the order of the county judge.

In other words, the statute of 1851 authorizes the county judge to dispense with the attendance of a grand jury at certain terms of the Court of Sessions to be specified by him. But his omission to designate terms at which he does not require a grand jury does not make the attendance of such a jury unlawful or irregular at any term of such court, which has been duly appointed by him, because the law is that a grand jury shall be drawn for any term of the County Court "at which a Sessions may be held by law."

A term of the County Court and a term of the Court of Sessions were appointed to be held at the same place, and on the same day, in February, 1864, that the indictment in ques-

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tion was found; and a Court of Sessions could lawfully be held at that time without any jury being designated therefor in the order of the county judge.

The decisions cited from *Parker and Howard's Reports* do not apply to this case, for the reason that no Court of Sessions was appointed in the orders mentioned in them, by which terms of the County Court were designated. (*See 1 Park. Cr. R.*, 570; *23 How. Pr. R.*, 297.)

The next and only remaining question in the case is, whether the county judge could lawfully designate two justices of the peace to act as justices of the Sessions, in the place of those elected, and who failed to appear at the time appointed for the commencement of the term at which the indictment was found.

The statute of 1847 plainly authorized him to make such designations. (*3 R. S.*, 5th ed., 296, § 11; *Laws of 1847*, vol. 2, 644, § 35.) He could undoubtedly have adjourned the court until the next day, without supplying the vacancies caused by the non-attendance of the justices of the sessions. (*See 2 R. S.*, 218, § 8; *Laws of 1847*, vol. 1, 330, § 36.) But he was not obliged to do that, for the statute of 1847 authorized him to take the course he pursued.

For the foregoing reasons, I am of the opinion the judgment of the Otsego Oyer and Terminer, overruling the demurrers to the first and second pleas of the defendant in error to the indictment, should be reversed, and such demurrer adjudged valid, and that the judgment of that court, sustaining the demurrers to the third and fourth pleas of the defendant in error to such indictment, should be affirmed, and the indictment, in all respects, held regular and valid, and that the indictment and record should be remitted to the Otsego Court of Oyer and Terminer, and the defendant in error required to appear in that court, and stand trial on the indictment, &c.

Judgment accordingly.¹

¹ The above decision was affirmed by the Court of Appeals, at the March Term, 1865.

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A.

ACCOMPLICE.

See EVIDENCE.

ADULTERATING MILK.

1. To authorize a conviction under the act passed April 23, 1862, entitled "An act to prevent the adulteration of milk and to prevent the traffic in impure and unwholesome milk," it is necessary to aver in the complaint or indictment, and to prove on the trial, that milk was adulterated with a view of offering it for sale or exchange. A charge that the defendant had adulterated without stating the object of such adulteration, is insufficient. *The People v. Fauerbach*, 311

2. Whether mixing water with milk is an adulteration within the meaning of the statute — *Quere?* 310

ARRAIGNMENT.

1. The object of an arraignment of a defendant, is to establish his identity. It is not indispensable to a valid arraignment, that the defendant should be called to the bar of the court, to answer the matter charged upon him in the indictment; and that, when so brought up, he should

be called upon, by name, to hold up his right hand. Any other acknowledgment or identity will answer the purpose as well. *The People v. Frost*, 52

2. Where the prisoner actually appeared and held up his hand, and thereby, and by subsequent acts, admitted his identity, it was held, on motion, in arrest of judgment, to be a valid arraignment. 51

ARREST OF JUDGMENT.

1. Where a defendant had been duly arraigned, and by acts, if not by words, had demanded a trial, and had procured the cause to be set down for trial, and had challenged jurors, produced witnesses, and examined and cross-examined witnesses on both sides, and had summed up the case to the jury, after a verdict of guilty, a motion in arrest of judgment, on the ground that a formal plea of not guilty had not been put in, was denied. *The People v. Frost*, 52

2. Where, on the trial of an indictment for manslaughter in the fourth degree, which lasted several days, the jurors were allowed to separate by consent of parties, after a verdict of guilty, the judgment will not be arrested on affidavits proving expressions used by one of the jurors,

both before and during the trial, tending to show bias against the defendant, where the allegations are fully met and repelled by the affidavit of the juror assailed, and where during the whole trial, the jury appeared to be attentive, patient and exemplary. *ib*

ARSON.

1. On the trial of an indictment, under 2 R. S., 698, § 3, for an attempt to commit arson, it appeared that the prisoner, having prepared camphene and other combustibles, and placed them in his room, solicited McD. to use them in burning a barn of S. D., and promised to give him a deed of land if he would do so, and it was held that the proof was sufficient to warrant the conviction. *McDermott v. The People*, 102
2. Form of an indictment for an attempt to commit arson in the third degree. *ib*
3. Under an indictment for arson in the first degree, a prisoner may be convicted of arson in the third degree, when he is proved to have set on fire a house, as well as the goods in it, for the purpose of prejudicing the insurer. *Freund v. The People*, 198
4. A prisoner may be convicted of arson in the second degree, as described in 1 R. S., 667, § 2, under a count charging that offense, if sustained by the evidence, although the facts proved would authorize his conviction for arson in the first degree under an indictment properly charging the higher offense.
5. The words, "not being the subject of arson in the first degree," used in the statute defining arson in the second degree (2 R. S., 666, § 2), were intended to distinguish between different degrees of the same

general offense, with a view to graduate the punishment, and do not create an exception which the pleader is required to negative in charging the offense of arson in the second degree. *The People v. Durkin*, 243

See EVIDENCE.

ASSAULT WITH INTENT TO KILL.

1. On the trial of a prisoner for attempting to discharge a pistol with the intent to kill, &c., under 2 R. S., 665, § 36, the prisoner's counsel requested the judge to charge "that the pointing of an uncocked Colt's revolver at a person is not an attempt to discharge the weapon." and the judge refused so to charge, and charged that it was a question of fact for the jury to decide, and not a question of law for the decision of the court; *Held*, That the ruling of the judge was erroneous, and the prisoner, having been convicted, the judgment was reversed on writ of error, and a new trial ordered. *Mulligan v. The People*, 105
2. A conviction for an attempt to discharge a pistol, under the statute referred to, cannot be had, where the individual indicted proceeded no farther toward an actual discharge or shooting than to raise and point the pistol, uncocked, at the party threatened. *ib*
3. A threat made by the prisoner at the time would constitute no part of the attempt to discharge the pistol; it would only be evidence of the intention of the prisoner. *ib*

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ATTORNEY.

See MISDEMEANOR.

AUTREFOIS ACQUIT.

1. Form of a plea of *autrefois acquit*.
The People v. Van Keuren, 66
2. Where a defendant had had in his possession, at the same time, several counterfeit bank notes purporting to have been issued by different banks, and had been tried for having had one of such counterfeit notes in his possession with intent to utter it, and had been acquitted, such acquittal was held to be a bar to a conviction, on a subsequent trial, on another indictment, for having had the others of such counterfeit bank notes in his possession with intent to utter them. 4b
3. On a plea of *autrefois acquit*, interposed in such a case, to which the district attorney demurred, judgment was given on the demurrer for the defendant. 4b

AUTREFOIS CONVICT.

1. A conviction for petit larceny before a Court of Special Sessions, is no bar to a subsequent conviction for burglary, where the prisoner is charged with breaking and entering a building with the intent of stealing therein, though the intent charged relates to the same larceny for which he had previously been convicted.
The People v. McCloskey, 57
2. On the trial of an indictment for having sold spirituous liquors without license, on the tenth of March and tenth of April, 1860, the defendant interposed a plea of *autrefois convict*, and, on the trial, proved by the record that he had been tried before a Court of Special Sessions, on a charge of having, on the 16th day of April, 1857, and on the first of April, 1860, and on divers other days between these dates, and the 9th of May, 1860, sold spirituous

liquors in quantities less than five gallons without license, and that he was convicted of the charge and fined five dollars; it was held that the plea was not sustained, and that to make the defense available, the defendant ought to have proved by evidence *abunde*, that the offenses for which he had been convicted, were the same violations alleged in the indictment. *The People v. Cramer*, 171

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B.

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1. Whether a prisoner in confinement, in pursuance of a final judgment, can be admitted to bail after an allowance of a writ of error, when there is no direction therein that the same shall operate as a stay of proceedings, doubted by Lorr, J.
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1. Form of an indictment for bigamy.
Hayes v. The People, 325
2. Under an indictment for bigamy, strict proof of marriage is necessary. It cannot be established by inference, or cohabitation, or admissions only. 4b
3. Marriage is merely a civil contract, and may be entered into in any manner which clearly evinces the intention of the parties. 4b
4. Where, on the trial of an indictment for bigamy, it appeared that the prisoner, who had been previously married, and whose wife was still living, agreed to marry J. W., and procured a person dressed as a clergyman to perform the marriage ceremony, at

which J. W. agreed to take the prisoner for her husband, and the prisoner agreed to take J. W. for his wife, and the person officiating pronounced them man and wife, and they afterwards cohabited together as such, it was held that the prisoner was guilty of bigamy, whether the person officiating as a clergyman was in fact what he was represented to be, or was procured to personate a clergyman for the purpose of deceiving J. W. on that occasion. 46

5. On the trial of an indictment for bigamy, it is not necessary to prove that, at the time of the alleged second marriage, the defendant did not come within any of the exceptions mentioned in part 4, chapter I, title 5, article 2, section 9 of the Revised Statutes. *Fleming v. The People*, 353
6. An objection that an indictment for bigamy contains no averment that the prisoner does not come within the exceptions set forth in section 9 of the statute, if available at all, should be made before judgment. After judgment, it is too late to raise the question. 46

BURGLARY.

1. In an indictment for burglary, the prisoner was charged with having broken and entered "the storehouse building of the Gulf Brewery, in which said storehouse building, goods, chattels, personal property, beer, ale and other valuable things were kept for use, sale and deposit, with intent," &c., &c. It was proved on the trial that the Gulf Brewery was a corporation occupying a room in the basement of the court house, which it had thus occupied for several years for storing beer, by the consent of those having the supervision of the building, and that such room was separated from other rooms in the basement by partition walls

with doors which were kept locked, the keys remaining in the possession of the agents of the corporation. The prisoner entered the basement through an open window into a hall occupied for public purposes, and thence entered the room occupied by the Gulf Brewery, by breaking through the door. It was held that the proof sustained the indictment, that the room broken into was properly described as the storehouse building of the Gulf Brewery, and that the prisoner was guilty of burglary in the third degree. *The People v. McCloskey*, 57

2. Where, on the trial of Wixson for burglary and larceny, the court charged the jury "that though Wixson had no part in breaking the store and taking the goods, yet if he knew it was to be done by Lockwood and Lee, or either of them, and the goods were immediately taken to his house, and he aided in furnishing a box to secrete the goods, and directed where they should be placed to avoid discovery and prevent the owner from finding them, so as to convert them to his own use, then he was guilty of larceny," the charge was held to be erroneous; and Wixson having been convicted of larceny on such a charge, the judgment was reversed. *Wixson v. The People*, 119

C.

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1. Form of a *certiorari* to a Court of Special Sessions and of a return thereto, and also, of the complaint taken before the magistrate, and of the recognizance taken to appear before the Court of Special Sessions. *The People v. Riley*, 401

See HABEAS CORPUS.

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• FORGERY.

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1. In a temporary commitment by a magistrate, for further examination, on a charge of larceny, it is not necessary to state whether it is grand or petit larceny, or what articles are alleged to have been stolen. (*Per* BARNARD, J.) *The People v. Nash*, 473

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COURT OF SESSIONS.

1. Where R. and B., two acting justices of the peace, were designated as members of the Court of Sessions of their county for the year 1860, but when so designated were not, within the requirement of the statute, "entitled to serve as justices of the peace during such year, by virtue of the election under which they were acting as such justices at the time of such designation," it was held, that their right to act as justices of the sessions could not be

questioned on the trial of an indictment before such court, and that it could only be inquired into on a direct proceeding against them by information in the nature of a *quo warranto*. *Nelson v. The People*, 39

2. The acts of public officers *de facto* done *colore officii*, under an irregular election or appointment, are valid as respects the rights of third persons and so far as concerns the public. *ib*
3. Where a grand jury was drawn and summoned, and attended and acted as such, at a term of a Court of Sessions appointed by the county judge, to be held at the same time as a County Court, the proceedings were held to be valid, although the county judge had omitted to designate in his order that a grand jury was required to attend at that term; and a plea in abatement, setting up such omission as an objection to the validity of an indictment, was, on demurrer, overruled. *The People v. Cyphers*, 666
4. When the justices, elected to act as justices of the Sessions, fail to appear at the time appointed for the commencement of a term of a Court of Sessions, the county judge has power to designate two other justices of the peace to act as justices of the Sessions, instead of adjourning over the court until the next day. *ib*

See COURT OF SPECIAL SESSIONS.

COURT OF GENERAL SESSIONS.

1. Where the term of the Court of General Sessions of the city and county of New York, is continued, under the provisions of the act of 1846 (*Sess. Laws of 1846*, p. 4), beyond the time prescribed by 2 R. S., 217, § 31, by reason of the unfinished trial of a case commenced dur-

ing the regular term, the court being legally in session, may proceed to pass judgment upon prisoners previously convicted. *Lowenberg v. The People*, 414

COURT OF SPECIAL SESSIONS.

1. There must be three police justices to hold a competent Court of Special Sessions in the city of New York. The forty-eighth section of the act of the legislature of April 14, 1857, is, so far as it affects this question, repealed by the eighth and ninth sections of the act of April 16, 1858. And where it appeared that a conviction had taken place before two police justices only, under which the defendant was imprisoned, he was discharged on *habeas corpus*. *The People v. Divine*, 62

2. A Court of Special Sessions, held under the act of 1857, ch. 769, § 1 (3 *R. S.*, 5th ed., 1000), has no jurisdiction of a charge of "malicious mischief." *Wait v. Green*, 185

3. G., a justice of the peace, issued a warrant for the arrest of W., on a charge that he "did willfully and maliciously unhook the traces of the harness on a span of horses, and then hitched to the wagon, then owned or in the possession of one L." W. was arrested under the warrant, and tried before G., at a Court of Special Sessions, and convicted of the offense charged, which was recited in the warrant and in the commitment in the words above quoted, and was held in custody under the commitment until discharged on *habeas corpus*: *Held*, That G. acted without jurisdiction, and was liable to an action for false imprisonment for the arrest. 5b

4. *Held, also*, That on the trial of the action for false imprisonment, it was not competent for G. to prove that

it was shown before the Court of Special Sessions that L. was in the wagon at the time the traces were unhooked, for the purpose of establishing an assault on L., and thus showing jurisdiction in the court, there being no such offense charged in the warrant or commitment. 5b

5. Where a person arrested and brought before a magistrate in the city of New York, under a charge of petit larceny, presented to a magistrate a writing, signed by him, in which he waived a jury and demanded to be tried before a Court of Special Sessions, it was held that he waived thereby his right, when subsequently brought before the Court of Special Sessions, to demand a jury, and to have his case removed to the General Sessions, and also his right of appeal to the General Sessions, under 2 *R. S.*, 715, § 26. *The People v. Riley*, 401

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CRIME AGAINST NATURE.

1. Form of an indictment for the crime against nature. *Lambertson v. The People*, 200

2. The allegation that the defendant "had a venereal affair" is not indispensable in an indictment for the crime against nature. The omission may be supplied by an allegation of "carnal knowledge," or some other equivalent allegation. 5b

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E.

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vate in the army of the United States, without the consent of his parents, is not valid under the legislative provisions of this State — *Quere. The People v. Burnett*, 113

EVIDENCE.

1. On the trial of an indictment for passing a counterfeit bank note, it is not competent for the prosecution to prove that, two or three days after the transaction in question, the prisoner passed two other counterfeit bank notes to other persons — the said notes not purporting to have been issued by the same bank as the one for passing which this indictment was found, and the uttering of them being in no way connected with that act. *The People v. Dibble*, 28
2. On the trial of an indictment for rape, after giving evidence of the commission of the offense, it is competent to prove acts of violence to property committed by the defendants in the same room and immediately after the alleged rape, for the purpose of characterizing the transaction. *Conkey v. The People*, 31
3. Where the husband of the prosecutrix was present at the commission of the alleged offense, and was also present, the next morning, when she complained of her treatment to a third person, it was held that it was not erroneous to prove by the husband that he also had made, at the same time, a communication to such third person of what had happened, the details of such communication not having been given in evidence. 26
4. Where a witness testified that he had heard three or four persons re-

siding in an adjoining town, but not in the immediate neighborhood of the prosecutrix, speak of her character for chastity, but did not know how she was generally regarded in the community, it was held that the witness was not competent to testify as to the general character of the prosecutrix for chastity. 26

5. A witness called to impeach general character, must be able to state what is generally said of the person by those among whom he dwells or with whom he is chiefly conversant. 26
6. Where a witness testified that he lived about a mile and a half from the prosecutrix, and said that "he did not know as he had the means of knowing about her character," but afterward said "he thought he was prepared to judge," it was held not to be erroneous for him further to answer, that he considered her general character good, it appearing that the defendants' counsel did not cross-examine him as to the grounds upon which, after first hesitating, he had stated he was prepared to testify. 26
7. On the trial of an indictment under chapter 74 of the Session Laws of 1854, it is not necessary for the prosecution to show with what weapon the assault was made, or the injuries inflicted. It is sufficient to prove that a *sharp, dangerous instrument* was employed by the prisoner, and the jury have a right to infer such fact from the nature of the wounds. *Nelson v. The People*, 39
8. Where, on the return to a writ of *habeas corpus*, the imprisonment was justified under a commitment in due form, by which it appeared that the prisoner had been regularly tried

- and convicted of petit larceny, before a Court of Special Sessions, held by three police justices, it was held to be competent for the prisoner's counsel to prove, by evidence *akunde*, that only two of the police justices were, in fact, present when the prisoner was arraigned and pleaded, and when he was tried and sentenced, for the purpose of showing that the proceedings before the Court of Special Sessions were *coram non judice* and void. *The People v. Divine*, 62
9. It is not erroneous for the court to charge the jury, on the trial of an indictment, that they may convict upon the uncorroborated testimony of an accomplice. *Wizson v. The People*, 119
10. On the trial of an indictment for obtaining property by false pretenses, it is competent to prove by the prosecutor, called as a witness in behalf of the People, that in the transaction in question he relied on the representations of the prisoner. *The People v. Sully*, 142
11. And where, on the trial of an indictment for obtaining property from C. by false pretenses, the representation made by the prisoner to C. was that there were no liens on the land except the mortgage then sold by the prisoner to C., while in fact there was a prior mortgage upon it, executed a few days before by M. to L., held that it was competent to prove that at the time of the execution of the prior mortgage, M. told L., in the presence of the prisoner, that he, L., need not be in a hurry to get his mortgage recorded, on the ground that such testimony, in connection with other acts proved, tended to show a conspiracy with M., and an intent on the part of the prisoner to cheat and defraud when he subsequently made the false representation to C. *ib*
12. Under an indictment for arson in the first degree, a prisoner may be convicted of arson in the third degree, when he is proved to have set on fire a house, as well as the goods in it, for the purpose of prejudicing the insurer. *Fraud v. The People*, 198
13. On the trial of such a charge, evidence that the prisoner had procured an insurance is competent for the purpose of showing motive. *ib*
14. Where the certificate of an insurance company had been introduced on the trial, for the purpose of showing that the prisoner had effected an insurance on the property, and the only objection made to it was that the evidence of the fact sought to be proved was not admissible under an indictment for arson in the first degree: *Held*, That no error had been committed by receiving the paper in evidence. *ib*
15. And where the execution of such a certificate had been duly proved, it was held not erroneous to permit also to be read in evidence a policy of insurance annexed to the certificate, and referred to in it; without proof of the execution of the policy, it appearing that no injury could possibly have resulted to the prisoner from its being put in evidence, the motive for the firing having been already abundantly proved. *ib*
16. Though a confession made by a prisoner under a promise of favor cannot, as a general rule, be given in evidence against him, yet if it lead to the discovery of a material fact, so much of the confession may be proved as relates strictly to the fact discovered. *Duffy v. The People*, 321

17. Where a prisoner, charged with stealing a watch, induced by a promise to get him out of difficulty, told the officer in whose charge he was that the watch was at the pawn office, and the officer went to the pawn office and found the watch, which was identified on the trial by the owner, it was held that the confession made to the officer was properly admitted in evidence. *ib*
18. Where a case depends entirely on the positive testimony of witnesses for the prosecution, and not on the effect which the jury may give to circumstantial evidence, it is not erroneous for the court to charge the jury that, if they believe the witnesses for the prosecution, it will be their duty to render a verdict of guilty. *ib*
19. A judgment will not be reversed because the court permitted the prosecution to prove the confession of the prisoner to the officer, while under arrest, as to the place where he had secreted money, it appearing that the money was found at the place designated by him. *Done v. The People*, 364
20. Where statements, made by the prisoner, have been proved and put in evidence on the part of the prosecution, they are only evidence to be considered in connection with all the other evidence in the case. The prosecution is not bound or concluded by them. *Lowenberg v. The People*, 414
21. The good character of a prisoner is always a proper subject for the consideration of a jury; it may be taken into consideration not only in a case where doubt of guilt exists, but it may sometimes, of itself, generate a doubt in the mind of the jury. But where a clear case of guilt is made out on the proof, evidence of good character is of comparatively little importance. *ib*
22. It is not a good reason for striking out evidence of the confessions made by a prisoner, that it appears such confessions were made while the prisoner was intoxicated, and that such confessions had been obtained by a detective police officer, who sought, by furnishing liquor, to ingratiate himself into the confidence of the prisoner. It belongs to a jury, in such a case, to say how far the prisoner was affected by the influence of liquor when he made the confessions, and what weight they are entitled to. *Jeffords v. The People*, 522
23. Such confessions, if made without any promise or inducement, though obtained by deception, the prisoner being misled as to the true object and character of the officer, are to be considered as voluntary. *ib*
24. The mother of the prisoner having been called, in his behalf, as a witness, and having testified, on her direct examination, that she was the widow of W., who was killed at the same time and by the same person as M., for whose murder the prisoner was on trial: *Held*, That it was not erroneous to permit the prosecution to prove, on the cross-examination of the witness, facts tending to show a relation to W., different from that sworn to by the witness. *ib*
25. For the purpose of proving that she was not the widow of W., as stated by her on her direct examination, it was held proper to ask her, on the cross-examination, if she had ever been married to H. M., who was stated by her to be still living; and she having denied such marriage: *Held, also*, That it was competent to ask her, on the cross-examination, whether she had ever

made an affidavit stating that she was the wife of H. M., it appearing that such affidavit had been lost; and after she had stated that she had no recollection of having made such an affidavit, it was held to be competent to prove the making by her, of such an affidavit by the magistrate before whom it was taken. *ib*

26. *Held, also*, That for the purpose of disproving her relation to W., claimed by the witness, and, also, of discrediting her, it was competent for the prosecution to introduce, in evidence, a deed executed by H. M., and by the witness as his wife. *ib*

See BIGAMY.

FORGERY.

RECOVERING STOLEN GOODS.

MURDER.

SEDUCTION.

EXCEPTIONS.

1. The judges of a Court of Oyer and Terminer have no power to settle and sign a bill of exceptions after a final adjournment of such court. *Dirge v. The People*, 9
2. Where, after the adjournment of a Court of Oyer and Terminer, a bill of exceptions in a criminal case which had been tried at such court, was settled by the justice of the Supreme Court, who had presided on the trial, and was afterward signed by such justice, and also by the two justices of the Sessions, who sat with him on the trial, and was filed more than ten days after such adjournment, and was afterward returned as part of the record on a writ of error, this court, on motion by the District Attorney, ordered the bill of exceptions to be struck from the record. *ib*

3. An exception to an expression by the court of an opinion on a question of fact, in a charge to the jury, is not available. *Conraddy v. The People*, 234

4. When a request to charge contains two propositions, one of which is right and the other wrong, it is not error in the court to refuse to charge as requested. *Tomlinson v. The People*, 313

5. A request made by counsel to the court, to consider him as excepting to each question to be asked a witness, is too general to be available. Each exception should be distinctly taken, and separately incorporated in the bill of exceptions. *Jefferts v. The People*, 522

6. It is not error in a judge, in charging a jury, to comment on the facts, or even to state his own theory in regard to them. *ib*

EXCISE LAWS.

1. Any person may keep an inn, tavern, or hotel, in this State, without having a license to sell strong or spirituous liquors and wines to be drank in his house; and a person keeping an inn, tavern, or hotel, without such license, who sells or gives away any intoxicating liquors or wines on Sunday, or on any day on which an election or town meeting is held, within a quarter of a mile of the place of such election or town meeting, is guilty of a misdemeanor, under the act of April 16, 1857. (*Laws of 1857, ch. 648, § 21; 2 R. S., 5th ed., 944.*) *The People v. Murphy*, 130
2. Where a defendant had been convicted before the Court of Sessions of a misdemeanor for a violation of the excise laws, and exceptions taken by him had been removed

into this court, by *certiorari*, and sentence stayed, on affirming the conviction, the proceedings were remitted to the Court of Sessions, with directions to proceed and render judgment, and the defendant was required to appear at the next term of that court to receive sentence. *ib*

3. Form of an indictment for selling spirituous liquors in quantities less than five gallons, without license; of a plea thereto of *autrefois convict*; and of a replication to the plea. *The People v. Cramer*, 171

F.

FALSE PRETENSES.

1. Form of an indictment for obtaining the signature to a check, money, contracts and other valuable things by false pretenses. *The People v. Sully*, 142
2. It is an offense within the statute against false pretenses to effect a sale of a mortgage on real estate by falsely, willfully and designedly representing and pretending, with intent to cheat and defraud, that it is the first lien on the mortgaged premises, and thereby obtain money or other valuable things from the purchaser. *ib*
3. The statutory offense is complete when a person is induced to put his signature to a written instrument, or to part with his property, by a false pretense or representation as to an existing fact, willfully and designedly made for the purpose of obtaining such signature or property, with the intent to cheat and defraud him; and it is not necessary that the pretense or representation should be such that common prudence or ordinary care could have

guarded against it, or that it should be accompanied by an "artful contrivance." It is sufficient if it be such that, if true, it would naturally, and, according to the motives which influence an honest mind, lead directly to the result alleged. *ib*

4. It is sufficient if the pretense be proved in substance and effect. The precise words need not be used, and the pretense may be proved by the conduct and acts of the prisoner in connection with his statements. *ib*
5. It is not material to the question of jurisdiction of the court where the pretenses were made. The obtaining of the signature or property by means of them, with intent to cheat and defraud, completes the crime and determines the place of trial. *ib*
6. It is not essential to convict under the statute, that actual loss or injury should be sustained. *ib*
7. Form of an indictment for obtaining money by false pretenses. *The People v. Smith*, 490
8. It is no defense to a charge of obtaining money by false pretenses, that the person from whom the money was obtained by the prisoner, was, at the time, indebted to the prisoner to an amount equal to the sum obtained by the false representation, and that it was the intention of the prisoner to apply such money on such debt. SUTHERLAND, J., dissented. *ib*

See EVIDENCE.

FELONY.

1. A felony may be committed through the instrumentality of an agent without the presence of the principal, when the agent is an innocent party; but if the person employed is guilty,

- he is the principal in the felony, and his employer is only an accessory. *Wisson v. The People*, 119
2. So a felony may be committed by a person constructively present, though not actually present; but to be constructively present, he must be of the party and do some act in execution of the common design, or be near enough to the scene of operations to assist in carrying it out, or to aid those who are immediately engaged in it to escape should necessity require. • 15
 3. If a felony has actually been committed, an officer, in arresting the offender or preventing his escape, will be justified in taking his life, provided there is an absolute necessity for his doing so; it is otherwise in case of an arrest for a misdemeanor. *Conraddy v. The People*, 234
 4. Where no process has been issued, a homicide can only be justified, even by an officer, by showing the actual commission of a felony, and that there was a positive necessity to take life in order to arrest or detain the felon. 15
 5. It is not a defense to an officer, in such a case, to show that he had reasonable ground to believe that the deceased had been guilty of felony, and that he had also reasonable ground to believe that the deceased would otherwise accomplish an escape. 15
- See MISDEMEANOR.**
- FORGERY.**
1. Form of an indictment for forgery in the first degree, charged to have been committed after a previous conviction for a felony. *Vincent v. The People*, 88
 2. In an indictment for forging a certificate of acknowledgment of a mortgage, it is necessary to allege that the officer, whose act it purports to be, was duly authorized to make such certificate, and the omission to make such allegation is not supplied by setting forth the certificate in *hæc verba*, if the venue or name of the county is omitted in the certificate, it appearing by the signature that the certificate purported to have been made by a commissioner of deeds. 15
 3. When the authority of the officer depends on locality, it must appear that he acted within the territorial limit prescribed by the statute; and if this does not appear upon the face of the certificate, the setting forth of the certificate in the indictment will not supply the omission of a general allegation of authority. 15
 4. Where, in an indictment for forgery, the counterfeit note, which it is charged the prisoner had in his possession, is set forth in *hæc verba*, it is unnecessary to allege, in addition, that the note purported to be the act of another. *Wilson v. The People*, 179
 5. On the trial of an indictment for forgery, the counterfeit note offered in evidence had upon its face the words, "Countersigned and registered in the Bank Department," and the signature of the register, "A. D. Ward." No such certificate or signature appeared on the note set forth in the indictment. It was held to be no variance. 15
 6. Form of an indictment for forgery, in passing a counterfeit bank bill after a previous conviction for a similar offense. *Cantor v. The People*, 217
 7. On the trial of an indictment for forgery in passing a counterfeit bill,

- it had been proved, without objection, that after the prisoner and B., his companion, had been arrested and brought to the station house, a boy came in and produced a roll of sixteen counterfeit bank bills, which he said B. threw away when in the company of the prisoner, while they were in custody on their way to the station house. Afterward the public prosecutor offered to put such counterfeit bank bills in evidence, but the evidence was objected to by the prisoner's counsel: *Held*, That it was still in time to object to the introduction of the bills in evidence, notwithstanding the hearsay evidence of the boy had been received without objection; and the counterfeit bills having been received in evidence, and the prisoner found guilty, the conviction was reversed and a new trial ordered. *ib*
8. An order for the delivery of goods, though not on its face addressed to any person, is the subject of forgery. It is sufficient if the order is of such a character that a person can, by the use of it, be deprived of property. *The People v. Noakes*, 291
9. Where, in an indictment for forging an order, it was charged that the prisoner's intent was to defraud the "Meriden Cutlery Company, and divers other persons to the jury unknown," it was held not to be erroneous for the court to refuse to charge the jury that the Meriden Cutlery Company could not be regarded as the subject of fraud. *ib*
10. Nor was it erroneous in the court to refuse to charge the jury that, if the grand jury knew, at the finding of the indictment, whom the prisoner intended to defraud, he could not be convicted of an intent to defraud persons unknown, where no evidence whatever had been given to show that the grand jury had any knowledge of that kind. *ib*
11. On the trial of an indictment for having in possession a counterfeit bank note, with the intention of passing it, it is no defense that the bank note is not set forth in the indictment, and that no reason for omitting to set it forth is assigned in the indictment. *Tomkinson v. The People*, 313
12. Form of an indictment for forgery in the third degree, in forging and uttering a bank check. *Clements v. The People*, 337
13. An indictment which charges the uttering of a forged bank check, will not be sustained by proof on trial of the uttering of a check, on the face of which was a forged certificate, purporting to be signed by an officer of the bank on which the check was drawn, though the check with the certificate on its face be set forth, *in hæc verba*, in the indictment. *ib*
14. The words, "certified by Sparks, Bank J. C.," written on the face of a check drawn on the Bank of Jersey City, constitute no part of the check, and proof of the forgery of such a certificate will not support a charge of forging the check. *ib*

See EVIDENCE.

G.

GRAVE ROBBERING.

1. Form of an indictment for feloniously removing the dead body of a human being from the grave for the purpose of dissection or sale, with a count for feloniously receiving a dead body, knowing it to have been feloniously disinterred. *The People v. Graves*, 134
2. On the trial of such an indictment, where the question of the identity

of the body disinterred is submitted to the jury, it is not erroneous for the court to charge that it would be just as good to identify a foot or a hand as the whole person. *ib*

H.

HABEAS CORPUS.

1. The question of a prisoner's guilt or innocence of a crime for which he is indicted, can in no case be decided on an application for a discharge on *habeas corpus*. *The People v. Ruloff*, 77
2. The presumption of innocence to which a prisoner is entitled on a trial before a jury, is not applicable to proceedings on *habeas corpus*. *ib*
3. The provisions of the Revised Statutes, under which a prisoner is declared to be entitled to his discharge if not brought to trial before the end of the next term of the court, unless satisfactory cause be shown by the district attorney (3 R. S., 5th ed., 1029, 1030), are not a "statute of limitations;" a failure to comply with them would be a mere irregularity, and would not entitle a prisoner to be discharged on a writ of *habeas corpus*. *ib*
4. Nor is it a sufficient cause for discharge on *habeas corpus* that the prisoner was not present in court when the trial of the indictment was postponed till the next term of the court, though it was the right of the prisoner to be present. *ib*
5. To authorize an application for a writ of *habeas corpus* to an officer residing in a county adjoining that in which the prisoner is detained, under 2 R. S., 563, it must be shown that there is no officer of competent jurisdiction within the county of the detention, or if any reside there, that he is absent or is incapable of acting, or has refused to grant the writ. It is not sufficient for the applicant to state generally in his affidavit that he could find no such officer. *The People v. Burnett*, 113
6. Where the application was made to an officer in an adjoining county, on the sixteenth of the month, on the ground that the county judge of the county in which the prisoner was detained, was absent from the county, and the affidavit showing the fact of his absence was made on the thirteenth of the same month, it was held to be insufficient, and that an affidavit of a later date should be produced, showing that the county judge had not returned in the interim. *ib*
7. Where there has been a previous decision on *habeas corpus* before another officer, on the same facts, the motion will be deemed *res judicata*; if such previous decision was wrong, the only mode of correcting it is by *certiorari*. *ib*
8. The city judge of the city of New York has no power to issue a writ of *habeas corpus*; under the statute of this State, the issuing of such writ is a ministerial and not a judicial act. *The People v. Nash*, 473
9. Form of proceedings to remove a decision by the city judge, on *habeas corpus*, into the Supreme Court for review, on a *certiorari* sued out in behalf of the People. *ib*
10. An application by a prisoner indicted and imprisoned for an offense not triable in a Court of Sessions, to be discharged, on the ground that he has not been brought to trial within the time prescribed by part 4, chap. 3, title 5, sec. 31 of the Revised Statutes, may be made to any court having jurisdiction to issue

a writ of *habeas corpus*. The right to discharge in such a case is not limited to the Court of Oyer and Terminer. *The People v. Jeffords*, 518

11. Where such an application was made to the Supreme Court at special term, in a case where the prisoner was indicted for murder, and it was shown by the public prosecutor that a special Court of Oyer and Terminer had been ordered by the Governor, to be held in the county within a few days thereafter, before which it was his intention to try the prisoner, it was held that the cause assigned was a satisfactory one, under the thirty-second section (2 R. S., 737), and the court ordered the prisoner to be detained in custody, and adjourned over the matter to a day after the sitting of the Oyer and Terminer, with leave to renew the application at that time, if, in the meantime, the indictment should not be brought to trial.

• See EVIDENCE.

HUSBAND AND WIFE.

See EVIDENCE.

I.

INDICTMENT.

1. An objection that the indictment appeared on its face to have been presented by twenty-four grand jurors, is not available on error where the defendants pleaded to the indictment and proceeded to trial without objection in the court below. *Conkey v. The People*, 31
2. The public prosecutor may insert several counts in the same indictment, alleging the offense distinctly

and separately, in various ways, to meet the evidence, and the court will not compel an election between them on the trial. *Nelson v. The People*, 39

3. It is not a valid objection to a count in an indictment that it refers to material matters alleged in a previous count, instead of repeating the allegation. *The People v. Graves*, 134
4. All that is necessary to the validity of an indictment is, that it enables a defendant to prepare for his defense, and to plead the judgment in bar of a second prosecution. 4b
5. In an indictment against a railroad company for an unlawful and willful neglect to erect and maintain fences on the sides of the road, it is necessary to aver that it was the duty of the corporation to erect and maintain such fences. *The People v. The N. Y. Central R. R. Co.*, 195
6. In an indictment for willfully cutting wood or timber upon lands of another, under 2 R. S., 693, § 15, as amended by the Laws of 1851, ch. 182, it is necessary to describe the lot or close upon which the trespass was committed; and where this was omitted, the indictment was quashed. *The People v. Carpenter*, 228
7. Form of an indictment for seduction under a promise of marriage. *The People v. Kenyon*, 254
8. Form of an indictment for bigamy. *Hayes v. The People*, 325
9. Form of an indictment for forgery in the third degree, in forging and uttering a bank check. *Clements v. The People*, 337
10. Form of an indictment for manslaughter in the second degree, in procuring an abortion under the act

- of 1846, chap. 22, sec. 1. *Collet v. The People*, 348
11. An indictment will not be quashed, on the ground that it was found and presented by the grand jury pending an examination of the same charge before a police magistrate. *The People v. Heffernan*, 393
 12. Form of an indictment for obtaining money by false pretenses. *The People v. Smith*, 490
 13. Form of an indictment for malicious mischief. *The People v. Moody*, 568
 14. Form of an indictment for nuisance, in permitting a plank road to be out of repair, with counts under the statute, and at common law. *The People v. The Branchport Co.*, 604
- See ARSON.**
BIGAMY.
FORGERY.
NUBANCE.
QUASHING INDICTMENT.
RECOVERING STOLEN GOODS.
- INSANITY.**
See MURDER.
- J.**
- JURY.**
1. In impanneling a jury for the trial of a felony, at the Oyer and Terminer in the county of Kings, it is not erroneous for the court, after failing to get a jury from the thirty-six jurors summoned for the first six days of the court, under the special act of April 17, 1853, applicable to that county, to refuse to summon talesmen, and to proceed to complete the jury from the thirty-six jurors summoned for the next six days of the court. *Lambertson v. The People*, 200
 2. It is a good ground of challenge to the array, that certain of the jurors had not been summoned by any legal authority, and that their names had been put upon the list of jurors by the clerk of the court, at their request, without any order having been entered requiring such jurors to serve, and when such a challenge interposed in behalf of a prisoner on trial for felony, was overruled by the court, on error, the judgment was reversed. *McCloskey v. The People*, 308
 3. On a trial for murder, a juror was challenged for principal cause, on the ground that he had formed or expressed an opinion as to the guilt or innocence of the prisoner, and it was shown that he had formed an opinion that the person charged to have been murdered, was killed by the prisoner: *Held*, That the challenge was not sustained. *Louvenberg v. The People*, 414
 4. Where, on a trial for murder, a juror was challenged for favor, on the ground that he had formed or expressed an opinion as to the guilt or innocence of the prisoner, the court refused to charge the triers, on the request of the prisoner's counsel, that they should find the challenge true, if, from the evidence, they should find that the juror believed that the person charged to have been murdered, was killed by some one. 46
 5. On a challenge for favor, the juror testified, before the triers, that he had conscientious scruples in reference to serving as a juror, in a case where the punishment, on conviction, would be death, that he would, if he took an oath to serve as a juror, render a verdict in accordance with

the evidence, but that it would violate his conscience to do so, that he could not, where the punishment was death, conscientiously render a verdict which would take a man's life, even if the evidence clearly showed that the prisoner was guilty. The court refused to charge the triers, that assuming what the juror had sworn to to be true, no cause was shown which would justify the triers in finding the challenge true. *ib*

6. The prosecution challenged a juror for favor, on the ground that he was not indifferent between the People and the prisoner. The prisoner's counsel demurred to the challenge and assigned for cause that the challenge did not specify any sufficient grounds in law, and the district attorney joined in demurrer: *Held*, That the demurrer was not sustainable, and it was overruled. *ib*

On such a challenge the juror, when examined as a witness before the triers, was asked, "have you any conscientious scruples against rendering a verdict of guilty, in a case where the punishment, upon conviction, is death?" On objection, held that the question was competent. *ib*

See INDICTMENT.

JUSTICE OF THE PEACE.

See COMMITMENT.
COURT OF SESSIONS.
WARRANT.

L

LARCENY.

1. Where a person is tried on an indictment charging him with steal-

ing from the person property of more than twenty-five dollars in value, and it is proved on the trial that the property stolen from the person was of less than twenty-five dollars in value, it is erroneous for the court to refuse to charge that the defendant can be found guilty of petit larceny only, and to charge that, if the defendant stole from the person the sum of eighteen dollars only, he may be found guilty of the offense charged in the indictment. *Rhodihan v. The People*, 325

2. It is the duty of the court, in such a case, to instruct the jury to find whether the property stolen from the person was worth more or less than twenty-five dollars. *ib*

See EVIDENCE.

M.

MALICIOUS MISCHIEF.

1. The willful trespasses over which jurisdiction is given to courts of Special Sessions, by the act of 1857, ch. 769, § 1 (3 R. S., 5th ed., 1000), do not include cases of "malicious mischief;" they refer only to such willful trespasses upon real estate as are made indictable and punishable as misdemeanors by statute. *Wait v. Green*, 185

2. A malicious act, however wanton or dangerous, which does not result in any destruction or even injury to property, does not amount to the misdemeanor known as "malicious mischief." *ib*

3. The wanton, malicious and secret destruction of the personal property of another is a misdemeanor at the common law. *The People v. Moody*, 568

4. The prisoner was indicted for having, in the daytime, maliciously and clandestinely, and in a spirit of wantonness and revenge, cut, mutilated and injured the harness of D. T. The indictment was quashed at the Sessions, on the ground that it did not charge any criminal offense, either at common law or by the statute. On error, the judgment was reversed, the court holding that the offense charged amounted to malicious mischief, and was punishable by the common law as a misdemeanor. *ib*
5. The case of *The People v. Kilpatrick* (5 Denio, 277), commented on and distinguished. *ib*
6. Form of an indictment for malicious mischief, and of an entry in the record quashing the same. *ib*

See COURT OF SPECIAL SESSIONS.

MANSLAUGHTER.

1. Form of an indictment for manslaughter in the second degree in procuring an abortion, under the act of 1846, chapter 22, § 1. *Cobel v. The People*, 348
2. An indictment for manslaughter in the second degree charged the killing of the quick child of M. A. B., by instruments used on her body, for the purpose of procuring an abortion. The jury found the prisoner not guilty of manslaughter in the second degree, but guilty of a misdemeanor in employing instruments and other means upon "the person of a pregnant woman, with intent thereby to procure the miscarriage of such woman:" *Held*, That the verdict was defective in not finding that the offense was committed upon the person named in the indictment, and the judgment rendered thereon was, for that reason, reversed. *ib*

MISDEMEANOR.

1. The statutory provision (2 R. S., 288), which declares it a misdemeanor for an attorney, counselor, or solicitor, to buy any bond, bill, promissory note, bill of exchange, &c., with the intent and for the purpose of bringing any suit thereon, is not applicable to a demand purchased with the intent of prosecuting it in a justice's court. *Goodell v. The People*, 306
2. If a felony has actually been committed, an officer, in arresting the offender or preventing his escape, will be justified in taking his life, provided there is an actual necessity for his doing so; it is otherwise in case of an arrest for a misdemeanor. *Conraddy v. The People*, 234

See ADULTERATING MILK.

MURDER.

1. The provisions of the act of April 14, 1860, entitled "An act in relation to capital punishment, and to provide for the more certain punishment of the crime of murder," so far as they apply to offenses committed before the act took effect, are *ex post facto*, and, therefore, unconstitutional and void. *Kuckler v. The People*, 212
2. Where a conviction had taken place under that act, for an offense committed before the act took effect, and sentence had been pronounced by the Court of Oyer and Terminer, in pursuance of the provisions of the act, no bill of exceptions having been returned with the record, and the only error committed having been in the giving of judgment, it was held, on reversing the judgment, that this court had no power to order a new trial, but that the prisoner must be discharged. *ib*

2. To grant a new trial, in such a case, would be a violation of the constitutional provision which protects the prisoner from "being twice put in jeopardy for the same offense," and, on the second trial, the plea of *autrefois convict* would be a good defense. *ib*
4. Section 25 of title 1, ch. 1, part IV of the Revised Statutes (2 R. S., 659), which provided that "the punishment of death shall, in all cases, be inflicted by hanging the convict by the neck until he be dead," was only declaratory of the common law as it existed at the time of the enactment; and the repeal of that section by the act of 1860 (ch. 410), left the common law mode of inflicting punishment of death by hanging, in full force and effect. *Done v. The People*, 364
5. For a murder committed in December, 1860, the prisoner was indicted in February, 1861, and tried in April, 1862, and found guilty, and the court gave judgment that the prisoner "suffer the punishment of death prescribed by law for murder in the first degree, and that he be imprisoned in the State prison at Auburn until such punishment be inflicted." On error the judgment was affirmed. *ib*
6. *Held, also*, That the judgment was not defective in omitting to sentence the prisoner to confinement at *hard labor*. A sentence to confinement in the State prison is necessarily a sentence of imprisonment at hard labor, the statute having prescribed that mode of punishment. *ib*
7. It is only in the case of convictions in the Court of General Sessions of the city of New York, brought up by writ of error, that the appellate court may grant a new trial without any exception having been taken in the court below. Since the amendment of the act of 1855 by the act of 1858, no such power exists in cases of conviction in the Courts of Oyer and Terminer. *ib*
8. On a trial in 1862 for a murder alleged to have been committed in December, 1860, the judge, among other things in his charge to the jury, said, "that the governor had refused to issue any warrant for execution under the statute; that he had been advised by the Court of Appeals, in the present state of the law it was inexpedient to do so," and afterwards said to the jury, "that they had nothing to do with the question of punishment which followed their verdict of conviction of murder; that that belonged to the law, and not to them to decide;" to which an exception was taken: *Held*, That no error was committed available to the prisoner. *ib*
9. On a trial for murder, the court charged the jury that if they found that the prisoner was justified in defending himself, and carried that protection further than was necessary for his defense, then he was guilty of manslaughter in some one of the four degrees. This, being unexplained by any other part of the charge, was held to be erroneous, inasmuch as it denied to the prisoner the right the law gave him to slay his assailant, if he was attacked under such circumstances as furnished him reasonable ground for apprehending a design to take his life, or to do him some great personal injury. *UM v. The People*, 410
10. Charge of the recorder of the city of New York, in a case of murder committed after the passing of the act of 1860, stating the rules by which the jurors were to discrimi-

- nate between murder in the first and second degrees, and manslaughter in the third and fourth degrees, and explaining the law of excusable and justifiable homicide, *Louvenberg v. The People*, 414
11. To convict of murder in the first degree, under the act of 1860, it is sufficient if premeditation and deliberation came into existence, with the intent to kill, on the instant of striking the blow by which the death was caused. 45
 12. The prisoner was convicted and tried before the Court of General Sessions of New York, in December, 1861, for having murdered Samuel Hoffman in November, 1861, and was found guilty of murder in the first degree, and, on the fourth of January, 1862, was sentenced to suffer the punishment of death on Friday, the twentieth day of February, 1863, and to be confined at hard labor in the State prison until such punishment of death should be inflicted. On error to this court, the judgment was affirmed. Justice INGRAHAM dissenting. 45
 13. Charge of the recorder in a case of murder, tried under the act of 1860, discriminating between and defining murder in the first degree and murder in the second degree, and commenting upon the rules of evidence applicable to each. *Jeffords v. The People*, 522
 14. To justify a conviction on circumstantial evidence, the facts and circumstances must be such as to exclude every other hypothesis than that of the guilt of the accused. 45
 15. Discussion, by the recorder, of the evidence bearing upon the question of motive for the commission of the act. 45
 16. The rules of law which render the confessions of a prisoner inadmissible as evidence when obtained under promises of favor, stated and explained by the recorder. 45
 17. Sentence of the prisoner, pronounced by the recorder, on conviction of murder in the first degree. 45
 18. On a trial for murder, evidence of threats made by the prisoner two years before the alleged murder was admitted. On review, it was held that such evidence was admissible, and that lapse of time was no objection to its competency; and it was also held that evidence afterwards given on the trial, showing that, after the threats had been made, friendly feelings were restored between the parties, did not render the previous evidence of threats incompetent, but made only an additional fact for the consideration of the jury in determining the weight to be given to them. 45
 19. Where a capital case has been tried at the General Sessions of New York, the Supreme Court has power, on writ of error, under the act of 1855 (*chap. 337, § 3*), "to order a new trial, when it shall be satisfied the verdict was against law, or against the weight of evidence, or that justice requires a new trial, "whether any exception shall have been taken or not, in the court below." 45
 20. On the trial of an indictment for murder the defense interposed was insanity. The judge charged, "that a man is not insane who knows right from wrong; who knows the act he is committing is a violation of law, and wrong in itself." Held, on review, that the charge was not erroneous. *Willis v. The People*, 631
 21. Charge of Mr. Justice PROCKHAM on a trial for murder. 45

22. Where there has been a conviction in a Court of Oyer and Terminer, and judgment has been stayed, the proceedings may be removed into the Supreme Court for review by *certiorari*: Where there has been a conviction and judgment, the proceedings can be removed into the Supreme Court for review, only by writ of error. 6b

23. The Supreme Court has no jurisdiction to entertain a motion for a new trial, on the ground of an irregularity which does not appear upon the record; but, after a writ of error has been returned, and not before, affidavits may be read upon the argument to correct an error arising out of an irregularity prejudicial to the rights of the prisoner, which does not appear on the record, and where he has no other legal mode of redress. Per INGALLS, J. 6b

24. But a conviction will not be set aside and a new trial granted, when it is apparent that no injury resulted to the prisoner from the alleged irregularity. 6b

25. A writ of error having been brought, and a return made after conviction and sentence in a capital case, affidavits were presented tending to show that S., one of the jurors, who had agreed to the verdict of guilty, had, before the trial, expressed the opinion that the prisoner was guilty and ought to suffer death; and that such expression of opinion was unknown to the prisoner and his counsel at the time of the trial. In opposition, the affidavit of the juror was read, denying fully and explicitly that he had ever formed or expressed any opinion, and other affidavits were read in corroboration. Upon a full examination of the affidavit, it was held

that there was no ground for complaint on the part of the prisoner, and the applications were denied and the judgment affirmed. 6b

See EVIDENCE.

EXCEPTIONS.

JURY.

N.

NUISANCE.

1. Form of an indictment for nuisance, in erecting and maintaining a dam, by which lands were overflowed to the injury of the public health. *Munson v. The People*, 18

2. Where a defendant is found guilty on an indictment for a nuisance, in erecting and maintaining a dam, and there is no averment in the indictment of a continuance of the nuisance, the court is not authorized to render a judgment for the abatement of the nuisance. It can only inflict a personal punishment upon the defendant. And where a judgment of abatement had been improperly rendered by the Court of Oyer and Terminer, in such a case, the Supreme Court, on a writ of error, reversed the judgment and remitted the proceedings to the Oyer and Terminer, that a proper sentence might be passed. 6b

3. In an indictment against a railroad company, for an unlawful and willful neglect to erect and maintain fences on the sides of the road, it is necessary to aver that it was the duty of the corporation to erect and maintain such fences. *The People v The N. Y. Central R. R. Co.*, 195

4. The object of a prosecution, by indictment, for nuisance to highways, is not the punishment of the defendant, but the repair of the

highway, when it is out of repair, or the removal of the nuisance when the highway is obstructed. *The People v. The Board of Supervisors*, 604

5. An indictment for nuisance, against a plank road company, contained the allegation that the defendants' road was, and had been, and at, and until the finding of the indictment, still was out of repair, to the damage and common nuisance of the citizens of the State, so that they cannot go and pass over the same without great trouble, annoyance and inconvenience: *Held*, That to authorize a conviction, it was necessary to show, not only that the road had been out of repair, but that it continued so to be, down to the time of the finding of the indictment. 60

6. Form of an indictment for nuisance in permitting a plank road to be out of repair, with counts under the statute and the common law. 60

See EGRESS.

O.

OWNER AND TERMINER.

See EXCEPTIONS.

P.

PRISON.

- Under chapter 110 of the Session Laws of 1853, the magistrates and courts of Kings county are required to send to the penitentiary, instead of the county jail, all persons convicted before them who shall be sentenced to imprisonment for thirty days or more. *People v. The People*, 85

PLEA.

1. Form of a plea of *alibi* acquit. *The People v. Van Kuren*, 66
2. Form of a plea to an indictment of the statute of limitations. *The People v. Roe*, 231

See EXTRAJUDICIAL CONFESSION.

COURT OF SESSIONS.

WRIT OF ERROR.

PRACTICE.

1. An indictment will not be quashed on the ground that it was found and presented by the grand jury pending an examination of the same charge before a police magistrate. *The People v. Hoffman*, 393

See ARRAIGNMENT.

ARREST OF JUDGMENT.

BAIL.

COMMITMENT.

COURT OF SESSIONS.

EXCEPTIONS.

EXTRA LAWS.

INDICTMENT.

JURY.

MURDER.

QUASHING INDICTMENT.

Q.

QUASHING INDICTMENT.

1. The defendants having pleaded not guilty to a defective indictment for murder, the court refused to quash it upon their motion. *The People v. Williams et al.*, 661
2. The court will not ordinarily quash an indictment after the defendants have been arraigned and pleaded not guilty. 66
3. In cases of indictments which charge the higher crimes, or other

offenses which affect the public at large, as perjury, forgery, &c., the courts uniformly refuse to quash, except where the objection could not be obviated or the error corrected by a new indictment. Per MOREAU, J. 46

4. The court is in no case bound to quash an indictment *ex debito iustitia*, but may oblige the defendant to plead or demur. It is to be presumed, in the first instance, that every person has a *christian* as well as a *surname*, and an indictment for murder is defective which describes the deceased as "one Hardy," without other designation, and without an averment by way of excuse, that his name is otherwise to the jurors unknown. Per MOREAU, J. 46

See INDICTMENT.
MALICIOUS MISCHIEF.
WRIT OF ERROR.

R.

RAPE.

See EVIDENCE.

RECEIVING STOLEN GOODS.

1. To convict of having feloniously received goods which had been stolen from an incorporated company, it is necessary to allege in the indictment, and to prove on the trial, that the company alleged to have been injured by the offense of the defendant was an existing corporation. *Cohen v. The People*, 330
2. On the trial of an indictment for receiving stolen goods, knowing them to have been stolen, the thief from whom the prisoner received the goods is not to be regarded as an accomplice, but as guilty of a

previous and different offense. *The People v. Cook*, 351

ROBBERY.

1. The mere snatching of a thing from the hand or person of another, without any struggle or resistance by the owner, or any force or violence on the part of the thief, will not constitute robbery. *McCloskey v. The People*, 299
2. Where the court instructed the jury that feloniously taking another's property with violence sufficient to constitute an assault and battery would make out the crime of robbery, it was held to be erroneous, and the prisoner having been convicted under such a charge, the judgment was reversed. 46
3. Where the property is not obtained by putting the person in fear of immediate injury to the person, the violence necessary to make the offense amount to robbery must be sufficient to force the person to part with his property, not only against his will, but in spite of his resistance. 46

S.

SECOND TRIAL.

1. To subject a prisoner to a second trial, where a former conviction on the indictment has been reversed, and a new trial ordered, by a court of review, on the application of the prisoner, is not a violation of the constitutional provision which declares that "no person shall be subject to be twice put in jeopardy for the same offense." *The People v. Ruloff*, 77

SEDUCTION.

1. On the trial of an indictment for seduction, under a promise of marriage, the prosecutrix testified that she had never had sexual intercourse with any other person than the defendant: *Held*, That it was competent on the part of the defense to contradict her evidence, either directly, by actual proof of such intercourse with others, or by facts from which the jury could infer such intercourse; and that, for the latter purpose, it was proper to prove by a witness that he had seen her commit wanton or lewd acts towards some other person than the defendant. *The People v. McArdle*, 180
2. Form of an indictment for seduction under a promise of marriage. *The People v. Kenyon*, 254
3. Charge of the court to a jury on a trial for seduction, containing a statement of the different questions of fact to be decided, and of the rules of law by which they were to be governed. 5b
4. The words, "previous chaste character," as used in the "act to punish seduction as a crime," mean "actual personal virtue." 5b
5. On the trial of an indictment under that statute, it is not competent for the defendant to prove what was the previous reputation of the prosecutrix for chastity; but the question is, was she, in fact, a woman of chastity before the alleged offense. It is only by proving specific acts that her previous character can be assailed. 5b
6. Nor is it competent on the trial of such an indictment, to prove by general reputation that the house of the mother of the prosecutrix, where the prosecutrix lived, was a house of ill-fame. If such a fact is proper to be proved, it should be established, not by hearsay, but by positive testimony. 5b
7. To convict under this statute, which subjects to punishment "any man who shall, under promise of marriage, seduce," &c., it is not necessary to prove on the trial that the defendant is twenty-one years of age. If he is old enough to be the father of the child begotten by him, he is sufficiently within the description of the statute to be amenable to punishment for the offense. 5b
8. The statute, in providing that no conviction shall be had on the testimony of the female seduced, unsupported by other evidence, does not require the testimony of an additional witness. The corroborating evidence may be supplied by the facts and circumstances surrounding the transaction and otherwise established in the case. 5b
9. Where the prosecutrix testified that she was unmarried, and it appeared that she was sixteen years of age at the time of the alleged offense, and living with her mother, the fact that she was unmarried was held to be *prima facie* sufficiently established within the requirements of the statute. 5b
10. Where a seduction is accomplished by means of a promise of marriage on the part of the seducer, a consent of the female to marry the seducer, amounting to a mutual promise on her part to marry, is implied. 5b
11. Where it was proved on the trial that the defendant was a frequent visitor at the house of the mother of the female seduced, that he waited on her to balls and parties, and took her out frequently to ride, and when her mother spoke to him about his keeping company

with her daughter, said his motives were good, it was held that such facts were proper evidence for the consideration of the jury, in corroboration of her testimony, to prove that he had made to her a promise of marriage. *ib*

12. The testimony of the female, as to the illicit connection with the defendant, is corroborated by evidence that she was delivered of a child, of the abundant opportunity afforded for the defendant to become the father of it, and of the external evidences of the intimacy existing between the parties. *ib*

13. The statute does not require that the testimony of the female shall be corroborated in every particular. It is only necessary that it should be supported in the main features of the case. *ib*

See INDICTMENT.

STATUTE OF LIMITATIONS.

1. The amendment of the Revised Statutes (*Laws 1860, chap. 271, p. 474*), as to the time within which indictments must be found, applies to offenses committed before its passage, if no indictment had been then found. *The People v. Roe, 231*

2. It seems in this State, the statute of limitations, to be available in a criminal case, should be pleaded. *ib*

3. Form of a plea to an indictment of the statute of limitations. *ib*

U.

UNITED STATES COURTS.

1. An indictment in a State court for an offense against the penal laws of

the State is not removable by the defendants, on petition, before plea, into the Circuit Court of the United States, under the provisions of section 5 of chapter 84 of the thirty-seventh Congress. *The People v. Murray, 577*

2. Congress has not the power to confer upon the United States courts jurisdiction to try indictments found in the State courts. *ib*

3. It is not enough that an act of Congress gives the United States Circuit Court jurisdiction of such a case. It can have no jurisdiction that is not conferred by the Constitution as well as by the law. *ib*

4. The dictum of Chief Justice MARSHALL, in *Osborn v. The United States* (9 *Wheat*, 821), declaring that Congress is capable of giving the Circuit Court of the United States original jurisdiction in any case to which the appellate jurisdiction extends, has no application to a case in the origin of which neither the Constitution nor laws of the United States are involved, and in which a question involving either may never arise, or, if it does, can only arise in the progress of the cause. By *HOFFMAN, recorder. ib*

V.

VERDICT.

1. The indictment contained three counts: first, against both defendants for rape; second, against C. for rape, and H. for assisting him in committing it; third, against both prisoners for assault and battery, with intent to commit a rape. The jury returned the following verdict: "They find the prisoners at the bar guilty of the offense charged in the indictments." It was held to be

equivalent to a general verdict of guilty, and that upon it the court might properly pass judgment against the defendants on the count charging the highest grade of crime. *Conley et al v. The People*, 31

2. When the jury render an imperfect verdict, the court may refuse to receive it, and direct them to retire and correct it, and may afterward receive the corrected verdict. *Nelson v. The People*, 39

3. Where, on the trial of an indictment, the jury bring into court a verdict defective in form, it is competent for the court, before they have separated, to send them out again to consider the case further, and to agree on a verdict in due form, though the informal verdict may have been received and entered in the clerk's minutes, and the jury may have made the usual response, assenting to it when the entry by the clerk was read over to them.

4. When a verdict, defective in form, is brought in by a jury, it is not erroneous for the court to direct the jury to retire again to say under which count they find the prisoner guilty. *The People v. Graves*, 134

W.

WARRANT.

1. A warrant of commitment, issued by a justice of the peace under part IV, chap. 2, title 1, sec. 5 of the Revised Statutes, is valid without a seal. *Gano v. Hall*, 651
2. When a justice of the peace, after an examination, has adjudged that a person brought before him shall give sureties to keep the peace, and the prisoner has refused to do so,

it is his duty to issue his warrant of commitment; and such warrant issued on the next day will be valid, though, in the meantime, the prisoner has been suffered to go at large by the consent of the justice. 36

3. Form of a warrant of commitment on a refusal to give sureties to keep the peace. 36

WITNESS.

1. On the trial of an indictment for a personal injury by the husband on his wife, the prosecution cannot be compelled to call the prosecutrix as a witness. But as the wife is a competent witness for the prosecution, she may be called as a witness in behalf of her husband, where the prosecution fails or neglects to call her. *The People v. Fitzpatrick*, 26
2. Where two or more persons, jointly indicted, are all put on trial together, neither one of the defendants can, until discharged from the indictment, be a witness for or against the others. *Wickson v. The People*, 119
3. Where two or more persons, jointly indicted, are tried separately, one of the defendants not on trial may, by permission of the court, be called and examined as a witness on behalf of the People against the defendant on trial, though the person so called and examined has not been convicted or acquitted, nor otherwise discharged; but a defendant in a joint indictment cannot, while the indictment is pending against him, be called as a witness for his co-defendants, though he be tried separately. (The case of *The People v. Donnelly*, 2 Park. Cr. R., 182, disapproved.) 36

4. Though it rests in the discretion of the court to decide whether a co-defendant may, on such separate trial, be called as a witness on behalf of the People, no formal application is necessary; and where a co-defendant was offered on the trial as a witness, and was objected to on the ground that he was a co-defendant, and could not be sworn except by special leave of the court, and the objection was overruled by the court, the decision was held to be equivalent to an order made on a special application of the court. *ib*

5. Where, on a criminal trial, one of the defendants is a competent witness on behalf of the People, the wife of such defendant is also a competent witness. *ib*

6. An accomplice is a competent witness for the prosecution on a criminal trial, and the jury may convict on the uncorroborated evidence of an accomplice, if they regard it sufficient to prove, beyond a reasonable doubt, the guilt of the accused. *The People v. Cook*, 351

WRIT OF ERROR.

1. The proceedings of a county Court of Sessions on the trial of an indictment, will not be reviewed on writ of error by the Supreme Court, until a record of judgment shall have been made up and filed; and when a return to a writ of error was defective in this respect, on motion of the district attorney, the writ of error was quashed. *Dawson v. The People*, 118

2. Form of a return to a writ of error by the Court of General Sessions of New York, containing writ of error, allowance of writ with stay of proceedings, indictment in a case of murder, necessary entries in the record, statement from minutes of the court, &c., &c. *Lowenbery v. The People*, 414

3. Form of a writ of error in behalf of the People, with an order that the prisoner be retained in custody; indictment for murder, with special pleas in abatement and demurrer thereto. *The People v. Olyphers*, 666

See MURDER.

EX. CIV. F.

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